IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Petitioners,

—v.—

CARL BEAZER, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

Expressed in the terms and circumstances of the case, certiorari has been granted to review the following two questions:

1. Whether the New York City Transit Authority's policy of excluding from employment in any of its non-

safety-sensitive positions all present or past patients in methadone maintenance treatment programs violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment, where both courts below, applying the traditional, least intrusive standard of review to an extensive trial record, found that the Authority's policy bears "no rational relationship" to any of its legitimate needs?

2. Whether the Transit Authority's policy violates Title VII of the Civil Rights Act of 1964 in that it has a grossly disparate adverse impact on blacks and Hispanics and is not justified by business necessity?

Additionally, as argued at pp. 65-71, infra, respondents contend that an appropriate threshold question is whether the writ of certiorari should be dismissed in light of recent Congressional action which makes clear that the Transit Authority's policy is unlawful under the Rehabilitation Act of 1973.

STATEMENT

In its statement of the case the Transit Authority attempts to shape this litigation into a new form bearing little, if any, relation to its history below. Making no reference to the massive record in plaintiffs' favor compiled in the district court, or to the fact that it left the district court's findings unchallenged in the court of appeals (Pet. 2a),[1/] the Transit Authority attempts to resurrect and retry here factual controversies that have already been conclusively laid to rest. Moreover,

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1/ The forms of citation used in this brief are as follows:

A. ___A refers to pages of the appendix in this Court.

CA ___a refers to pages of the court of appeals appendix.

Tr. ___/___/___, p. ___ refers to pages of the dated transcripts of trial.

Dep. p. ___ refers to pages of transcripts of depositions.

Pl. Ex. ___ refers to plaintiffs' trial exhibits.

Pet. ___a refers to opinions and orders of the courts below as reproduced in the appendix to the petition for certiorari.

Pet. Br. refers to petitioners' brief.

Where cited material in the original record is reproduced in the court of appeals appendix, there is a parallel citation to that appendix.

through inaccuracy, omission and careful selectivity, the Authority has fundamentally distorted the factual context within which this case has been adjudicated and has attempted to create serious misimpressions regarding the scope of the relief which has been granted. Respondents are compelled, therefore, to restate the case completely.

INTRODUCTION

This action--brought pursuant to 42 U.S.C. §1983, the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.--challenged the legality of the New York City Transit Authority's policy of denying employment to any person who had ever been treated in a methadone maintenance program.[2/] The policy was absolute, applying to every one of the Transit Authority's 47,000 jobs--from janitors, file clerks and secretaries to painters, plumbers, and

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2/ The action was brought by four named plaintiffs. Two of the plaintiffs had been dismissed by the Transit Authority and two had been rejected as job applicants because of their participation in methadone maintenance programs. A class, as described in the district court opinion (Pet. 16a), was certified under Fed.R.Civ.P. 23(b)(2).

mechanics. While some of these jobs were admittedly safety sensitive, most were no more so than the common occupations in our society. Under the policy any job applicant or current employee who was found to have a history of methadone maintenance treatment was automatically rejected or fired with no consideration of individual qualifications, demonstrated work performance, or years of service at the Transit Authority or elsewhere.

The United States District Court for the Southern District of New York, in a decision later upheld by the United States Court of Appeals for the Second Circuit, held that the application of the Transit Authority's methadone policy to all positions was not "rationally related to . . . safety . . . or any other needs of the TA" (Pet. 19a), and thereby violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The court explicitly left to the Transit Authority discretion to exclude methadone maintenance patients entirely from all safety-sensitive jobs. As to non-sensitive jobs, the court left to the Transit Authority discretion to require that methadone maintenance patients have been successfully enrolled in treatment for at least a year, and to take into account any relevant factors in their personal backgrounds or treatment histories. Pet. 66-67a.

PROCEEDINGS AND DECISIONS BELOW

A. District Court Proceedings

The district court conducted a thoroughgoing factual inquiry into the following issues: (1) the scope of the Transit Authority's employment policy respecting methadone patients and the process by which the Transit Authority had formulated that policy; (2) the nature of Transit Authority employment and the needs of the Authority regarding the performance of its employees and the safety of its operations; and (3) the nature of methadone maintenance treatment and the performance abilities of methadone patients. After extensive discovery and stipulations of fact regarding Transit Authority employment and the formulation of the Authority's methadone policy, the court set the case down for a trial which eventually consumed some three weeks.

Plaintiffs made a lengthy presentation on the nature of methadone maintenance treatment and the characteristics of methadone patients through testimony from many of the leading authorities on the subject. First was the director of the President's Special Action Office for Drug Abuse Prevention and the National Institute on Drug Abuse, the coordinating agencies in the field of drug abuse treatment and research for the

federal government, which for a decade has undertaken a vast commitment of resources and support to methadone maintenance as the primary treatment modality for heroin addiction. Tr. 10/22/74, pp. 3-69, 107, 116; CA 513-81a, Pl. Ex. 30. He was followed by clinicians with direct experience treating methadone patients, and by independent researchers with specialized knowledge about methadone patients' medical condition, functional abilities, social rehabilitation, and vocational experiences.[3/]

Plaintiffs also presented testimony from major employers who had had direct experience with the work performance of methadone maintenance patients in a wide variety of jobs, including highly skilled and safety-sensitive positions.[4/]

The Transit Authority called witnesses to describe the nature of Transit Authority employment, and one expert, a pharmacologist of limited knowledge and experience whose testimony the court found "too speculative to be of much value". Pet. 20a; Pet. 33a.

3/ Tr. 10/24/74, pp. 300-10, 312-27, CA 681-711a, 712-35a, Pl. Ex. 35-37; Tr. 10/25/74, pp. 362-91, 417-50, CA 762-823a, Pl. Ex. 40.

4/ Tr. 10/24/74, pp. 332-53, CA 736-61a, Pl. Ex. 38; Tr. 10/25/74, pp. 568-73, CA 1145-55a, Pl. Ex. 39; Tr. 10/29/74, pp. 575-87, 589-619, 636-65, CA 1156-1241a, Pl. Ex. 42-44.

Then, at the court's request, the court and counsel made a comprehensive eight hour inspection of the Transit Authority's various facilities--organized and conducted by the Authority--to obtain a first hand view of the performance and risks involved in different job positions. Tr. 10/30/74, pp. 769-71, CA 1336-38a; Tr. 11/27/74, p. 3, Ct. Ex. A, CA 292-303a.

Although both parties indicated after the inspection that they had concluded their proof, the court expressed concern that the evidence so disproportionately favored plaintiffs that perhaps it had not received a balanced and complete factual picture. This concern led--at the court's insistence--to nine additional trial days and an "exhaustive effort" to determine "whether all sides of the problems involved in the case had been thoroughly explored." Pet. 20-21a. Through twenty-two additional witnesses [5/] the court probed in further detail the process by which the Transit Authority's policy had been formulated, the nature of the Transit Authority's operations and the specific duties of its various employees, the opinions of medical authorities of varying points

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5/ Six of these witnesses were court witnesses (CA 317a,1608-09a), selected primarily because they had authored articles arguably critical of methadone treatment cited by the Transit Authority at trial.

of view, and the operational and clinical experiences of New York City's major methadone treatment programs.

B. District Court Decisions

On August 6, 1975, the district court issued an opinion containing fifty-one pages of fact findings. Pet. 13-64a. Relying on what it found to be overwhelming evidence, the court concluded that the Transit Authority's absolute methadone policy was utterly without rational justification:

> Plaintiffs have more than sustained their burden of proving that there are substantial numbers of persons on methadone maintenance who are as fit for employment as other comparable persons.
>
> No one can have the slightest doubt about the heavy responsibilities of the TA to the public, including their duty respecting the safety of millions of persons who are carried on its subways and buses. However, in my view, the blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.
>
> . . . .
>
> . . . [T]he crucial point made so strongly by plaintiffs' witnesses was never convincingly challenged--that methadone as administered in the maintenance programs can successfully erase the physical effects of heroin addiction and permit a former heroin addict to function normally both mentally and physically. It is further proved beyond any real dispute that among the 40,000

> persons in New York City on methadone maintenance (as in any comparable group of 40,000 New Yorkers), there are substantial numbers who are free of anti-social behavior and free of the abuse of alcohol or illicit drugs; that such persons are capable of employment and many are indeed employed. It is further clear that the employable can be identified by a prospective employer by essentially the same type of procedures used to identify other persons who would make good and reliable employees . . . .
>
> This proof applies with equal, if not greater, force to those former heroin addicts who have successfully completed participation in a methadone program.

Pet. 19-22a.

Accordingly, the court held that the Transit Authority's policy violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. However, the court explicitly left the Authority with unfettered discretion to continue a total exclusion of methadone maintenance patients from safety-sensitive positions, as well as a wide degree of latitude in determining whether to employ methadone maintenance patients in non-sensitive positions:

> I wish to stress certain things not compelled by my holding. The TA is not required to hire any present or past methadone maintained person where there is a legitimate reason to question the person's ability or competence--including a legitimate reason to believe that the person is abusing illicit drugs or alcohol . . . . The TA is not prevented from making reasonable rules and regulations about methadone maintained persons--such

> as requiring satisfactory performance in a program for a period of time such as a year, or forbidding methadone maintained persons employment in sensitive categories such as that of subway motorman, subway conductor, subway towerman, bus driver, and jobs dealing with high voltage equipment . . .

Pet. 67a (emphasis in original).

On January 24, 1977 the court entered a permanent injunction and judgment incorporating this limited constitutional decision. The judgment also directed payment to plaintiffs of counsel fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Pet. 75-80a.[6/]

C. Court of Appeals Decision

On June 22, 1977 the court of appeals unanimously affirmed the district court's constitutional ruling. Pet. 1-8a. The court characterized the district court's opinion as "comprehensive and carefully limited". Pet. 2a. It noted that the district court had adopted a "rational

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6/ Prior to Congressional enactment of the 1976 Act, solely for the purpose of determining the plaintiffs' right to a fee award, the district court had found the Transit Authority's policy violative of Title VII in light of its disproportionate racial impact. Pet. 71a.

relationship" standard of constitutional review and had correctly applied that standard to factual findings which the Transit Authority had not even challenged. The factual findings, the court of appeals found, were "overwhelmingly" supported by the record. Pet. 2a.

Given the Civil Rights Attorney's Fees Award Act of 1976 as a basis for plaintiffs' fee award, the court of appeals expressly refused to reach the issue of the Authority's liability under Title VII. Pet. 3a.

FACT FINDINGS AND RECORD BELOW

The decisions of the district court and the court of appeals are rooted in clear, detailed findings of fact compelled by a massive record. Contrary to the impression the Transit Authority's brief attempts to create, there is virtually no conflicting evidence regarding the central facts at issue.

A. The Transit Authority's Absolute Methadone Policy

The claims of the Transit Authority (Pet. Br. 5) regarding the scope of the very policy about which this case revolves provide a glaring example of its attempt to create factual controversies where there are none.

From the outset, this action has challenged the Transit Authority's flat, across-the-board employment policy barring current, as well as former, methadone patients from all Transit Authority positions. A.24A et seq. The all encompassing nature of this policy has never seriously been disputed. Indeed, the evidence is overwhelming that the Transit Authority's methadone policy is but part of an even more sweeping rule under which the Transit Authority will not employ any person with any history of narcotic usage.

In its answer to plaintiffs' amended complaint the Transit Authority unequivocally admitted that "the Transit Authority do[es] not employ persons who use or have a history of using narcotic drugs, including methadone." A.60A (emphasis added). Much the same language was used by the Authority during discovery when asked by interrogatory to give a detailed description of its employment policy respecting drug-free former heroin addicts: "It is the present policy of the Authority, as it was of its predecessors, not to employ or retain in its employment any person who is presently using heroin or other narcotic drug or has a history of such usage." Pl. Ex. 1, no. 31, p. 3-4, Tr. 10/22/74, p. 147 (emphasis added). The accuracy of the interrogatory answer was unambiguously confirmed during depositions of the current and former chief executive officers of the Authority

(Yunich Dep. p. 5-6, CA 2672-73a; Ronan Dep. p. 8, CA 2657a),[7/] the Authority's executive officer for labor relations and personnel (McLaren Dep. 1/31/74, pp. 43-44, CA 2477-78a), and the Authority's medical director (Lanzetta Dep. pp. 41-43, CA 2415-17a).[8/]

In the face of these clear consistent admissions, the Transit Authority in its brief in this Court (Pet. Br. 5) has nonetheless insisted on placing in contest the overall nature of its methadone policy--claiming that while it will not employ current methadone patients, it will individually consider for employment former methadone patients and other persons with a prior addiction history who have been drug-free for at least five years. This contention is entirely inconsistent with the Transit

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7/ Eight months before the lawsuit was filed the former chief executive officer of the Transit Authority had similarly stated the Transit Authority's policy in a letter to the chairman of the New York State Temporary Commission to Evaluate the Drug Laws:

> It is the present policy of the Transit Authority not to employ or to retain those individuals who are participants in a narcotic rehabilitation program. We do not distinguish between those who have completed any rehabilitation or are now on a program. Pl. Ex. 6, Tr. 10/22/74, p. 157 (emphasis added).

8/ All portions of depositions cited in this brief were received in evidence at trial. See Tr. 2/12/75, p. 1470.

Authority's litigation posture below.[9/] It is, moreover, without support in the record.

The only hint in the record of some moderation in the Transit Authority's policy came three months after the trial of this case began, when the Transit Authority's executive officer for labor relations and personnel claimed (during his third trial appearance) that the Authority had very recently decided to "give individual consideration" to job applicants who had been drug-free for "from five to ten years." Tr. 1/28/75, p. 709, CA 1106a. It is this, and only this, testimony that the Transit Authority cites (Pet. Br. 5) to indicate that it has an individual policy respecting the employment of drug-free persons. Upon cross examination, however, it became clear that the Transit Authority had not in fac' made a policy change. It had only decided that it might consider whether to make a change in the future:

> Let me clarify one thing. When I say we are reviewing the cases [of individual drug-free applicants], I didn't really mean that. It is reviewing the procedure. We are trying to find at what point we would exercise--settle on a policy in this area.

9/ E.g., Transit Authority Court of Appeals Brief 4 (question presented was whether the Transit Authority was constitutionally required to employ "persons who are or in the past had been maintained on methadone").

Id., at p. 725, CA 1122a. The very limited nature of this shift in the Transit Authority's litigation posture was noted by the district court.[10/] And the record does not contain one scintilla of evidence that, except in the context of this litigation, the Transit Authority has ever knowingly employed anyone with a prior addiction history--despite the fact that it hires 3000 persons annually.[11/] Pet. 55a.

B. The Transit Authority's Failure to Assess the Need for Its Methadone Policy

Contrary to the claims of the Transit Authority (Pet. Br. 6-7), it has never made a bona fide assessment of the relationship of its methadone policy to its legitimate needs. The Transit Authority's complete

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10/ "The TA has indicated that there might be some flexibility with respect to a person who had once used methadone, but had been free of such use for a period of five years or more. But even on this point, there is no official directive indicating that the person would be considered for employment." Pet. 18a.

11/ In any case, even the Transit Authority's own belated suggestion of a shift in policy toward drug-free persons, however lacking in credibility, leaves uncontested the fact that it excluded all persons with a history of narcotic usage well into the time of trial.

failure to make such an assessment was abundantly clear to the district court, and it permeated both the record and the history of the district court proceedings.

Through discovery it was established relatively early in the case that the Transit Authority's methadone policy came into being without even an affirmative decision being made to adopt it. As the Transit Authority's medical director testified, the Authority had an old rule against narcotic use by its employees, and when methadone maintenance treatment was developed it was automatically included within the scope of the rule's prohibition without any consideration being given to the difference between it and other narcotic use:

> Q. Would you describe to me generally the process by which the policy of not hiring and not retaining in your employ ex-addicts was formulated . . . ?
>
> A. I couldn't tell you because it was there, I mean the thing is, you bring up a subject that I think no one was aware of drug addicts until lately, I think maybe when I became medical director, and it was one of the standards you know, that drug addicts or barbiturates or any dependent drugs, you would be disqualified.
>
> . . . .
>
> Q. Was there a policy on Methadone when you became medical director?
>
> A. Again, you bring up the word Methadone, it is a narcotic and as long as narcotics disqualify, it wouldn't have to be named Methadone, it is a narcotic.

Lanzetta Dep., pp. 63-64, CA 2432-33a.

Once the methadone policy came into being responsible officials at the Transit Authority made no attempts to appraise the need for it--their attention was directed solely to enforcement measures. William Ronan, who served as chief executive officer of the Transit Authority during almost all of the pre-trial history of the case,[12/] testified to this effect with great specificity:

> Q. Was the drug policy . . . ever reviewed by you as part of any internal review . . . ?
>
> A. In terms of an overall review of personnel policy, we accepted the existing personnel policies which seemed to be satisfactory, and there was no major overhaul of the personnel policy during the time that I was there.
>
> Q. I believe that you stated earlier that at those times that you did consider whether the policy should be continued, you consulted with persons from among your cadre of Executive Officers.
>
> A. Actually, it was not a question of whether we thought the policy should or should not be continued. That was never discussed. It was the question of implementation of the existing policy.

12/ Ronan was chairman of the Transit Authority from March, 1968 until May, 1974. A. 75-76A. The trial of the case began five months after he left office. It is during his tenure that the Transit Authority alleges (Pet. Br. 5-7) that it conducted an assessment of the need for its methadone policy.

> I would not want to give you the impression that there has been a discussion as to any recommended change in the policy. I recall no such discussion of anyone or anyone suggesting to me as the Chairman and Chief Executive Officer, either from the Board level or the Executive level--I recall no one having raised the question that we should change the policy. Discussions were in terms of the implementation of the policy, as I recall.

Ronan Dep., pp. 6-7, CA 2655-56a. This failure to act persisted despite the condemnation of the Transit Authority's policy by an official state investigatory commission[13/] and the Authority's own Impartial Disciplinary Review Board.[14/]

13/ The New York State Temporary Commission to Evaluate the Drug Laws condemned the Transit Authority's methadone policy and characterized plaintiff Beazer's dismissal from the Transit Authority as "[t]he most revealing example of the manner in which prejudice against addicts can overwhelm all other relevant considerations. . . ." Temporary State Commission to Evaluate the Drug Laws, Employing the Rehabilitated Addict, New York State Legislative Document No. 10 28-30 (1973).

14/ The Impartial Disciplinary Review Board is a joint labor-management body that may review and make recommendations regarding Transit Authority disciplinary decisions even though it has no legal power to alter them. A.108A. In reviewing plaintiff Beazer's dismissal

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Since it was apparent at an early point that the Transit Authority had not previously considered its methadone policy, the court offered it the opportunity to do so in the course of the litigation. Thus, a few months after the action was filed the New York City Civil Service Commission--at that time a party defendant--proposed to join with the Transit Authority in a cooperative study of the the feasibility of employing methadone maintenance patients in Transit Authority jobs. CA 73-75a. The court urged the Transit Authority to accept this proposal, and, since it appeared to do so, the court informally stayed proceedings. At an early stage, however, it became clear that, whatever the results of the study, the Transit Authority had no intention of revising its methadone policy. The study was subsequently abandoned. Tr. 1/13/77, p. 139, CA 54-64a. As

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its opinion and recommendation stated, in part:

> The Board feels that it is incumbent upon the Union and the Authority to reconsider the rules and practices of the Transit System as it relates to drug users. They should particularly examine the merits of the relatively new methadone program. Perhaps, through their careful consideration of the drug problem as it relates to the employees of the Authority, they will find a way to help employees, such as Carl Beazer, who have struggled so valiantly and well to overcome the drug habit.

Tr. 10/22/74, p. 155, Pl. Ex. 5, CA 2693a.

the court later observed, the Transit Authority's sole interest in the study had been to use it as a possible means of validating its existing exclusionary policy:

> . . . [T]here was a lot of evasion and it finally turned out there wasn't any objective study. All they were doing was . . . simply trying to persuade the [City] personnel department that there was enough backing for their preconceived notion and that's all.
>
> They had no intention of reevaluating anything and that was admitted finally after a lot of questioning.

Tr. 1/13/77, p. 139; see also Tr. 12/12/74, p. 115, CA 1034a. No serious assessment, was ever conducted by the Transit Authority. Immediately prior to trial it stipulated that it had "never studied the requirements of . . . TA jobs . . . to determine the . . . ability of . . . persons participating in methadone maintenance programs to perform the various jobs." A. 79A.

The complete and continued unwillingness of the Transit Authority to evaluate its own policy deeply concerned the district judge. After hearing the first day of trial testimony and examining the extensive discovery evidence and pre-trial stipulations submitted by the parties he expressed his concern at length:

> THE COURT: . . . [T]he Transit Authority has a practice but not a policy . . . . [N]obody remembers how it was exactly developed and it has been used but not scrutinized. I don't find any

evidence that the Transit Authority has really made an intelligent evaluation of whether or not the methadone people can or cannot work on the various jobs.

. . . .

. . .[T]here is nothing I have seen that indicates that the Transit Authority has really attempted to find out the reasons pro and con, and so I am here as a federal court starting from scratch, taking up a case to see whether there is a rational ground for the Transit Authority practice where the Transit Authority itself has not made any attempt to do that. You can do it better than I can if you do it. You are the employer.

MR. SUMMERS: What might be "desirable," your Honor, is a different matter than what is constitutionally required, you know.

. . . .

[THE COURT:] I think that the Transit Authority, for its own sake, should have examined this problem . . . and come up with some cogent policy that really is a policy and a policy means something thought out, not just stumbled into.

Tr. 10/22/74, pp. 184-87.

Throughout the trial the district judge asked for evidence describing what, if any, policy making process the Transit Authority had engaged in. He received in response vague, self-serving testimony from Wilbur McLaren, Transit Authority executive officer for labor relations and personnel. This testimony, the sole support offered by the Transit Authority for its present claim (Pet. Br. 6-7) that its methadone policy resulted from a reasoned review, was filled with obvious misconceptions

regarding methadone.[15/] Much of it was offpoint, relating purely to enforcement of the Transit Authority's policy against employing drug abusers.[16/] Indeed, to the extent that the testimony dealt with relevant subjects, it was contradicted by other evidence, including the witness' own statements.[17/] A month after hearing the

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15/ Given the evidence already before the district court, McLaren's misconceptions were apparent and would have been so to anyone who had given any objective consideration to the subject. See pp. 36-44, infra.

16/ The Transit Authority has misleadingly cited (Pet. Br. 6) to a portion of this offpoint testimony (Tr. 10/25/74, pp. 501, 502, 508, 510, 534) as the basis for the proposition that the Transit Authority initiated "seminars and conferences" regarding persons with drug histories and discussed with "some of the leading experts in the field" the possibility of employing methadone patients. Pet. Br. 6. When read in context (see, e.g., district court's comments at p. 506) the testimony at pp. 501 and 502 of the transcript actually describes the Transit Authority's search for better methods and professional help in detecting drug abusers so they could be discharged from its workforce. The testimony at pp. 510 and 534, though more misleading (see n. 17 infra), relates to the same topic. And the testimony on p. 508 refers to the abortive Transit Authority-Civil Service Commission study described on pp. 20-21, supra.

17/ For example, during some of the testimony cited by the Transit Authority (Tr. 10/25/74, pp. 510, 534, 535-44)

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testimony, the judge, while asking for more evidence on what the Transit Authority had done to formulate its policy, evaluated what was already before him:

> I think the answer is already in the record. You really haven't done much of anything.

Tr. 11/27/74, p. 26, CA 312a.

McLaren vaguely described a process by which he allegedly sought out a number of persons knowledgeable about methadone maintenance treatment and received from them information to the effect that methadone patients are unemployable. On cross examination, however, he admitted that the only established authorities on methadone maintenance whom he could definitely recall having talked with were Drs. Gollance, Dole and Trigg. Tr. 10/25/74, 562-63. In later testimony McLaren described how he had actually contacted Dole solely for the purpose of finding means of more accurately identifying active addicts so the Transit Authority's existing drug policy could be better enforced, and he expressly denied having discussed with Dr. Dole the employability of methadone patients. Tr. 12/12/74, p. 179. ("Q: Do you recall no conversation in which you discussed with him possible employment of methadone maintained persons? A: No, I do not." Moreover, to the extent that Dole, Gollance and Trigg had advised McLaren — whether gratuitously or otherwise — regarding the Transit Authority's methadone policy, it was to tell him that methadone maintenance patients were suitable for Transit Authority employment. See Transit Authority stipulations at A. 80-81A; Tr. 1/7/75, pp. 64-65, CA 1545-46a; Tr. 1/9/75, p. 154, CA 1633a. Gollance and Dole had even offered to help the Transit Authority in the process of selecting methadone patients

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Viewed in context, the Transit Authority's present claims regarding the process by which it formulated its policy evaporate. In large part the district court determined to what extent the Transit Authority's policy was rational because of the Transit Authority's past and continued refusal to look to rational factors on its own.

C. The Nature of Transit Authority Employment

The district court made detailed findings regarding the nature of Transit Authority employment. Pet. 54-62a.[18/] Those findings, virtually unchallenged here (see

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for jobs. Tr. 1/7/75, pp. 65-67, CA 1546-48a; Tr. 1/9/75, p. 163, CA 1642a.

McLaren also mischaracterized his relationship with Dr. Trigg, indicating that Trigg was his regular consultant on the employability of methadone patients. Tr. 10/25/74, 544-46. Trigg denied any such role, stating categorically that he had been retained by the Transit Authority solely for the limited purpose of determining whether Transit Authority employees facing discharge due to alleged drug abuse were in fact drug abusers. E.g., Trigg Dep. 3/21/74, pp. 48-51, CA 2619-27a.

18/ These findings were based on many stipulations made on the subject (A. 87-102A), the extensive testimony of Transit Authority officials (e.g., Tr. 1/31/75, pp. 777-947, CA 1998-2069a; Tr. 2/12/75, pp. 1256-1356, 1419-59), an on-site tour of Transit Authority operations (see

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Pet. Br. 4-5), clearly establish that most Transit Authority jobs are neither unique nor safety-sensitive. Furthermore, "it is perfectly clear that large numbers of the employees in the TA perform work essentially similar to the type of work done in other businesses and industries where methadone maintained persons appear to be successfully employed." Pet. 55a.

1. Job positions and employment structure

The Transit Authority's 47,000 employees hold about 400 different job titles, the majority of which are non-operating positions involving common tasks. Pet. 56a. Among the non-operating positions are, for example:

	number
account clerks	25
accountants	54
bookkeeping machine operators	49
car cleaners	950
caretakers	229
carpenters	167
cashiers	32
clerks	664

p. 8, supra; Tr. 11/27/74, pp. 1-5, CA 287-303a) and masses of documentary material (e.g., Tr. 2/12/75, p. 1467, Pl. Ex. 60; CA 333-61a.

collecting agents	145
keypunch operators	57
masons	198
messengers	12
painters	679
plumbers	207
porters (janitors)	1162
stenographers	92
stock assistants	103
stockmen	72
token sellers	4145
turnstile maintainers	141
typists	223
watchmen	162

Pet. 56a; Tr. 2/12/75, p. 1467, Pl. Ex. 60.

About 3400 Transit Authority employees work in so-called "city-wide" civil service job titles and, by the Transit Authority's own stipulation, perform tasks that are essentially the same as those performed by persons employed throughout New York City agencies (where discrimination against methadone maintenance participants is expressly prohibited).[19/] Pet. 53a; A84A. In job

19/ The "city-wide" job titles include those positions most commonly found in municipal government, such as clerks and secretaries. Employment standards for such titles are established uniformly for all agencies — including the Transit Authority — which are under the jurisdiction of the New York City Civil Service Commission. Under the Commission's medical standards and official policy directives present and former methadone patients are entitled to be considered individ-

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titles peculiar to the Transit Authority large numbers of employees also do obviously non-sensitive, and often menial, work. For example, the Transit Authority's 950 "car cleaners" do no more than sweep, wash and otherwise clean up subway cars. Pet. 58-59a. Another 5600 persons work in the Transit Authority's subway stations, cleaning, selling tokens and repairing turnstiles. Pet. 62a. And about 3000 persons are employed in the Transit Authority's various shops where, under supervision, they perform maintenance tasks like painting and body work on subway cars. Pet. 60a.

The Transit Authority has built into its employment system a variety of mechanisms to ensure against inadequate job performance. Before Transit Authority employees are hired they must go through a thorough background investigation, medical examination and civil service test (Tr. 2/12/75, pp. 1284-85, 1287-92, 1356). After being hired and as a condition of any promotion

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ually for employment in city-wide titles in use in the Transit Authority. However, as the district court described, the Transit Authority has evaded these provisions through use of the "one in three rule" contained in the New York Civil Service Law which allows the Transit Authority to pass over job candidates who have been certified for appointment by the Civil Service Commission. Pet. 51-53a.

they must complete lengthy probationary terms during which they are subject to especially close supervision. Pet. 57a; Tr. 1/31/75, p. 820-21, CA 2042-43a.

After probation, almost all Transit Authority non-operating employees still work under the direct supervision of a foreman or supervisor. Pet. 57a. Most operating employees are similarly supervised; those that are not directly supervised must report in each morning to a foreman who determines their fitness for duty and who is trained to detect alcohol and drug abuse problems. Tr. 2/12/75, pp. 1262-66, 1280; Tr. 1/31/75, pp. 808-13, CA 2030-35a.

The system is also carefully structured to ensure that the more responsibility a job entails the more checks there are against poor performance. For example, entry-level positions are generally low-level unskilled jobs, and higher level jobs can be obtained only after years of satisfactory on-the-job performance. Transit Authority workers often must begin employment as "helpers" or "trainees" and perform under close individual supervision for a year or more before they are even eligible for promotion to more responsible levels. Pet. 62a.

Finally, the Transit Authority's disciplinary structure provides for immediate action against unfit employees. The Transit Authority can, and does, immedi-

ately suspend from active service employees who report unfit for duty, including employees under the influence of alcohol or drugs. Crannan Dep., p. 1264.

2. Employment of disabled persons

The non-sensitivity of most Transit Authority jobs is confirmed by its employment policies respecting alcoholics, diabetics, epileptics and cardiac patients who concededly could create risks if employed in safety-sensitive positions.

The Transit Authority stipulated below that, in contrast to its policy excluding former addicts presently or in the past maintained on methadone, it does not maintain a blanket rule barring the employment of alcoholics. Instead, it considers the "hiring of such persons on an individual basis in light of factors such as their rehabilitation and the safety sensitivity of the job to which they seek appointment." A.96A. Moreover, the Transit Authority does not dismiss active alcoholics discovered in its employ. Although drinking on the job or reporting unfit for duty by reason of drinking is a violation of Transit Authority rules, employees with three years of service are virtually never dismissed for a first offense. Pet. 63a; A.98A. If a first offender works in a critical position he is transferred to less sensitive duties; if he works in a non-critical area he is suspended

from work for a maximum of three days. Pet. 63a.[20] About 50-60 percent of the Authority's job positions are classified as non-critical for purposes of its alcoholism policy. E.g., McLaren Dep. 1/31/74, p. 136, CA 2518a. These positions include a wide variety of jobs such as office work; maintaining subway track, tunnels and structures; and cleaning and repairing subway cars. Pet. 64a.[21]

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[20] For a detailed description of the Transit Authority's alcoholism policy see testimony of Joseph Warren, director of the Transit Authority's alcoholism program, Warren Dep., CA 2538a et seq. It should be noted that the Transit Authority's statement that it refuses to consider applicants with alcoholism problems (Pet. Br. 26) refers only to current alcoholism problems.

[21] The Transit Authority also makes available an in-house counseling program to its employees with drinking problems. It was stipulated that the success rate of the counseling program "is only approximately 60%, since some participants have relapses into drinking and some employees referred to the program drop out or refuse to participate. Nevertheless, persons who do not succeed in the . . . [p]rogram are allowed to continue in the employ of the Authority as long as their on-the-job performance remains adequate." A. 100A.

The Transit Authority also stipulated that employees in safety sensitive positions whose drinking problems have not been discovered by the Authority may

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The Transit Authority has also stipulated that it gives individual consideration to job applications from diabetics, epileptics and persons with heart disease. A.94-95A. Employees from any of these groups would obviously pose a safety risk if all Transit Authority jobs were sensitive. For example, an endocrinologist and assistant professor of medicine at Columbia University testified that, even when in treatment, diabetics are in a substantially more unstable and dangerous physical condition than normal individuals.[22/]

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participate in the counseling program on a confidential basis. "Such enrollment is not reported to the employees' supervisors, and they are not required to accept a demotion in position. . . . Persons have enrolled in the counseling service on a confidential basis while serving in such highly sensitive positions as motormen, towermen, dispatchers, and trainmasters." A. 100-101A; Pet. 64a.

About 2300-2400 employees currently participate in the Transit Authority's alcoholism counseling program. Pet. 64a.

22/ Diabetics are subject to comas, especially under stress, and they generally suffer serious vascular changes leading to a significantly increased incidence of strokes and heart attacks. Tr. 10/25/74, pp. 373-76, CA 776-79a.

D. The Suitability of Methadone Maintenance Patients for Employment at the Transit Authority

"Myths and misconceptions abound" concerning methadone maintenance treatment (Pet. 20a), and here, as below, the Transit Authority clings to them in an attempt to justify its policy. Former addicts in methadone treatment are simply not—as the Transit Authority contends—an undifferentiated mass of incurables incapable of either doing everyday jobs or being selected for them. Indeed, as the district court's findings establish, methadone patients as a group bear no inherent characteristic making them any less suited for employment than anyone else:

> . . . [M]ethadone as administered in . . . maintenance programs can successfully erase the physical effects of heroin addiction and permit a former heroin addict to function normally both mentally and physically.
>
> . . . .
>
> . . . [A]mong the 40,000 persons in New York City on methadone maintenance (as in any comparable group of 40,000 New Yorkers), there are substantial numbers who are free of anti-social behavior and free of the abuse of alcohol or illicit drugs . . .
>
> . . . .
>
> . . . [S]uch persons are capable of employment and many are indeed employed . . . [and] the employable can be identified by a prospective employer by essentially the same type of proce-

dures used to identify other persons who would make good and reliable employees.

Pet. 21a.

The court's findings rested on a trial which had afforded "a unique opportunity" to explore objectively the relevant issues in depth. Pet. 20a. Testimony came from an extraordinary gathering of leading drug treatment authorities, including both supporters and critics of methadone maintenance. As described supra pp. 8-9, the district court's demand for evidence was extraordinary. After hearing virtually unchallenged testimony from array of persons be called so that every viewpoint could be heard and every relevant issue explored. In the end it was abundantly clear that, despite the public controversy regarding some other aspects of methadone maintenance treatment, there was no genuine controversy regarding the key facts at issue here.

1. Origins and rationale of methadone maintenance treatment

The origins and overall medical rationale of methadone maintenance treatment were described to the district court primarily by Robert L. DuPont, Jr., M.D., then the senior federal official in the field of drug abuse

treatment and research[23/] and Vincent P. Dole, M.D., a professor at Rockefeller University and senior physician to Rockefeller University Hospital.[24/] Dr. Dole was called as a court's witness. See p. 8 n. 5, supra. Order filed 1/2/75, CA 317a.

Fifteen years ago Dr. Dole and Dr. Marie Nyswander, a psychiatrist experienced in the treatment of heroin addicts, initiated an extensive study of heroin metabolism at Rockefeller University Hospital. The study demonstrated that former heroin addicts administered stable doses of methadone on a sustained basis show the alert behavior, activity and interest of normal, non-addicted individuals. As a result of the Dole-Nyswander study, a pilot methadone maintenance treatment program was established at the Beth Israel Medical Center in New York City. E.g., Pet. 25a; Tr. 10/22/74, pp. 9-12, CA 530-33a; Tr. 1/7/75, pp. 5-14, CA 1485-94a.

Eventually thousands of heroin addicts were admitted to methadone maintenance treatment at Beth Israel

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23/ Dr. DuPont was director of the President's Special Action Office on Drug Abuse Prevention and the National Institute on Drug Abuse. See DuPont curriculum vitae, Tr. 10/22/74, p. 8, Pl. Ex. 30, CA 513-22a, 529a.

24/ See Dole curriculum vitae, Tr. 1/7/75, p. 4, Pl. Ex. 48, CA 1480a, 1484a.

and numerous other medical facilities throughout the country. E.g., Pet. 25-26a; Tr. 1/7/75, pp. 16-19, CA 1496-99a; Tr. 10/22/74, pp. 12-13, 56-57, 533-34a, 576-77a. For many years now methadone maintenance has been the predominant form of treatment for heroin addiction in the United States. At the time of trial about 70,000 persons, roughly sixty percent of all former heroin addicts in treatment, were enrolled in methadone maintenance programs. About 40,000 of those resided in the New York City area. E.g., Pet. 26a; Tr. 10/22/74, pp. 56-57, CA 576-77a.

The rationale for methadone maintenance as a treatment for heroin addiction is simple. Heroin is a short-acting drug and must be taken several times a day to prevent narcotic withdrawal symptoms. Heroin addicts also tend to bounce every 3-4 hours from one physical state to another, going from a "euphoria" or "rush" immediately after a drug injection to lethargy and the onset of eventual withdrawal. In contrast to heroin, an adequate oral dose of methadone[25/] achieves a stable

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25/ Methadone is dispensed in a non-injectable form (Tr. 2/7/75, pp. 1148-49, 2264-65a) and the administration of the drug is rigidly controlled by government regulation. See p. 50, infra.

concentration in the bloodstream and completely suppresses withdrawal for a 24-36 hour period. Methadone maintenance patients also experience a stable physical state, feeling none of the ups and downs to which heroin addicts are subject. E.g., Pet. 24a. Furthermore, through their ingestion of methadone they develop a "cross tolerance" or "blockade" to the effects of other narcotics, so that the injection of even a large dose of heroin has no physical impact. E.g., Pet. 24a; Tr. 10/22/74, pp. 44, 51-53, CA 564a, 571-73a.

2. Physical abilities of methadone maintenance patients

Although the Transit Authority will concede only that maintenance on methadone can enable former heroin addicts to lead "relatively" normal lives (Pet. Br. 9), the district court found that "[t]he overwhelming weight of the evidence is to the effect that a methadone maintenance patient can perform normally, and that undesirable side effects are lacking." Pet. 33a. At trial, all the negative assumptions which might be advanced regarding methadone's physical effects were shown to be entirely without substance.

The directors of all the major methadone treatment programs in New York, together with Drs. DuPont and Dole, were called by plaintiffs or the court to testify

regarding their direct clinical experiences with thousands of methadone participants. They unanimously affirmed that, after a short adjustment period, persons maintained on methadone exhibit no side effects of consequence and are entirely capable of normal functioning.[26/]

These clinicians' conclusions were confirmed by evidence received about the extraordinarily systematic studies done during the past decade and a half into every aspect of methadone treatment's physical impact.[27/] As the court noted, "there has been a remarkably intensive effort to test and observe methadone maintenance

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26/ See, e.g., Testimony of Paul Cushman, M.D., (director of St. Luke's Hospital Methadone Maintenance Treatment Program), Tr. 10/25/74, pp. 367-70, CA 770-73a; Testimony of Joyce H. Lowinson. M.D. (director of the Methadone Maintenance Treatment Program of the Albert Einstein College of Medicine), Tr. 2/7/75, pp. 1127-29, CA 2243-45a; Testimony of Robert L. DuPont, M.D., Tr. 10/22/74, pp. 24-33, CA 544-53a; Testimony of Vincent P. Dole, M.D., Tr. 1/7/75, p. 33, CA 1513a; Testimony of Bernard H. Bihari, M.D., (director of the New York City Methadone Maintenance Treatment Program), Tr. 2/12/75, pp. 1385-88, CA 2340-43a.

27/ Tr. 10/22/74, pp. 25-33, CA 545-53a; Tr. 10/24/74, pp. 305, 314-20, 326-27, CA 684-99a, 706a, 722-28a, 734-35a, Pl. Ex. 35; Tr. 10/25/74, pp. 369-73, CA 772-76a; Tr. 1/9/75, pp. 197-214, 224-30, 237-38, CA 1682-99a, 1709-15a, 1722-23a.

patients and to gather statistics about their performance." Pet. 33a.

Norman B. Gordon, Ph.D., the leading authority on the impact of methadone maintenance on human performance[28/] described the decade of sensitive laboratory studies through which he and various colleagues have examined every conceivable measure of methadone patients' physical and intellectual functioning. Tr. 10/24/74, pp. 305, CA 684-99a, 706a, Pl. Ex. 35. One series of tests, for example, compared patients who had been maintained on high doses of methadone for a year or longer with college students, professional staff members, and other non-addict groups.[29/] Among the

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28/ Dr. Gordon is an experimental psychologist. At the time of his testimony he was chairman and professor of psychology, Department of Psychology, Yeshiva University and guest investigator, Rockefeller University. See Gordon curriculum vitae, Tr. 10/24/74, p. 301, Pl. Ex. 36, CA 681-83a, 702a.

29/ Gordon, Warner, and Henderson, "Psychomotor and Intellectual Performance Under Methadone Maintenance," Report to the Committee on Drug Dependence, National Academy of Sciences, National Research Council 5136 (1967); Gordon, "Reaction Times of Methadone-Treated Ex-Addicts," 16 Psychopharmacologia 337-344 (1970); Gordon, and Appel, "Performance Effectiveness in Relation to Methadone Maintenance," Proceedings, Fourth National Conference on Methadone Treatment

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functions tested were intellectual performance, psycho-motor performance, learning a new skill, retention of a learned skill, visual reaction time for simple tasks, visual reaction time for complex tasks, and auditory reaction time. In not a single test did the performance of the methadone patients differ significantly from that of the comparison group. On the basis of his studies Dr. Gordon concluded that "maintenance on methadone results in no physical side effects that present barriers to any vocational activities." Tr. 10/24/74, p. 305, Pl. Ex. 35, CA 684a.

Dr. Gordon's findings were confirmed by Richard D. Blomberg, an expert on human performance in safety-related environments. On behalf of the National Highway Traffic Safety Administration, Blomberg had conducted a major scientifically controlled study of methadone patients' ability to perform a complex task, driving, in non-laboratory settings.[30/] Tr. 10/24/74, p. 314, CA 722a. The study demonstrated that methadone patients' driving records are identical to the general

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425-27 (1972). For a listing of Dr. Gordon's other studies see Tr. 10/24/75, pp. 301, 305, CA 683a, 684-85a, 702a, 706a.

30/ Blomberg is an industrial and management engineer. See Blomberg curriculum vitae, Tr. 10/24/74, p. 312, Pl. Ex. 37, CA 712-18a, 720a.

population's (Tr. 10/24/74, pp. 316-20, CA 724-28a), a finding with wide-ranging positive implications:

> Driving is one of the more complex psycho-motor tasks that a normal human undertakes. It involves many aspects of motor performance, controlling a car . . . perceptual performance, decision-making, risk-taking and so forth. It is my opinion that anyone who can perform adequately in the driving task could perform in virtually any other safety-sensitive task such as operating machine tools, driving trucks and so forth . . . .

Tr. 10/24/74, p. 326, CA 734a.

In addition to exploring research on the effect of methadone maintenance on human functioning, the court called Mary Jeanne Kreek, M.D., senior research associate at Rockefeller University, to testify about the medical safety of methadone maintenance and its long-term physiological consequences. Order filed 1/2/75, CA 317a. By virtue of her continuous medical research since 1964 into the side effects of methadone maintenance (Tr. 1/9/75, pp. 225-26, CA 1710-11a), Dr. Kreek is the most knowledgeable physician in the country on the topic.[31/] Her scrutiny of thousands of methadone maintenance patients, including some in treatment for as long as eleven years, has revealed "no . . . unexpected adverse

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31/ See Kreek curriculum vitae, Tr. 1/9/75, p. 197, CA 1676-80a. For a sampling of the reports of Dr. Kreek's research see id at pp. 1678-80a.

effects, side effects or any alterations of bodily function." Id., at p. 231, CA 1716a. The only persistent medical complaints that she received from methadone patients related to constipation, increased sweating and decreased libido. She noted that all of these are common complaints in the general population (CA 1687-93a, Id., at p. 202-08, 224-25, 1709-10a), and that none constituted problems affecting the complainants' capacity for "normal functioning in whatever their daily activities would be." 32/ CA 1710a.

3. Success of methadone maintenance treatment

In defense of its refusal to employ any methadone patient for any job, the Transit Authority claims that methadone maintenance has "failed to achieve its goal for the majority of patients". Pet. Br. 13. The Transit Authority fails to specify exactly which patients and what goal it is talking about. But what is relevant to this case is that the vast majority of methadone maintenance patients who remain in treatment after an initial

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32/ In light of Dr. Kreek's testimony, and the overwhelming testimony of clinicians (see n. 26, supra), the Transit Authority's suggestion that methadone programs maintaining their patients on "low" doses do so out of concern for the long term effects of the drug is pointless.

adjustment period cease all substance abuse and obtain and retain employment. It is this population--methadone patients of more than a year--to whom the district court has limited relief. Pet. 77a.

Elimination of Substance Abuse

As the district court found, the uniform experience of methadone programs has been that "... the strong majority of methadone maintained persons are successful, at least after the initial period of adjustment, in keeping themselves free of the use of heroin, other illicit drugs, and problem drinking." Pet. 42a.

Admittedly, in the early stages of methadone maintenance many patients attempt to "challenge" their methadone with heroin to see for themselves whether the methadone blockade effect they have been told about really works. Pet. 40a. Some methadone patients also abuse other drugs or alcohol, the effect of which methadone does not block. Within the first six months of entering a methadone program, however, these problem patients are readily identifiable.33/ Most patients who

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33/ E.g., Tr. 10/25/74, p. 467, CA 847a ("there is ... a hard-core group who are very difficult for the programs to work with, these represent a minority, and ... programs know who they are ..."); Tr. 2/7/75, p. 1089, CA

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continue treatment stop abusing drugs and alcohol. The remainder either drop out or are expelled.[34/]

2205a ("Those patients who are engaged in . . . [illicit] activity stand out. The good patients kind of fade into the background. . ."); Tr. 2/3/75, p. 1040-42, CA 2159-61a. See also p. 50, infra regarding the extensive procedures used by methadone maintenance programs to monitor patients.

34/ Dr. Lukoff, a court's witness, explained the significance of the initial treatment process as follows:

> There is always a self-cleansing in any rehabilitation program where those [who] are more interested in rehabilitation are the ones that stay with your program. . . . These are the ones you're referring to when you're talking about employment.

Tr. 10/25/74, p. 468, 848a.

The evidence in the record substantiating the district court's finding that most methadone patients who remain in treatment cease all substance abuse was exhaustive, and was recounted at length in the district court's opinion. Pet. 40-42a; 44-45a. Except for referring to a study by Chambers and Taylor and the testimony of one witness, both of which were discredited at trial (Pet. 39a), the Transit Authority generally accepts the district court's finding. It argues primarily only that the district court erred by not relying on the characteristics of addicts who enter methadone treatment for a short period of time to discredit the majority of patients who remain in treatment and succeed. (Pet. Br. 16-18). The legal irrelevance of this argument is explained at pp. 95-96, infra.

Employment Among Methadone Patients

Methadone patients who successfully adjust to treatment are as employable as comparable persons without addiction histories. And as the court found, "there is impressive evidence about successful employment among methadone patients." See, e.g., Pet. 42-44a.

Many methadone patients (thirty percent in some methadone programs) are already employed at the time they enter treatment. Others are employed in a matter of weeks. The majority in many methadone programs are employed within a year. Pet. 42-44a.

Most patients are not, as the Transit Authority implies (Pet. Br. 22), working in small "pilot programs." They are working throughout the economy, in ordinary jobs, where their drug treatment histories are neither known nor an issue. This was related to the district court by Seymour Joseph, M.D., deputy commissioner of the New York State Drug Abuse Control Commission and a court's witness:

> We have people in methadone treatment programs who are performing any and every type of service in this city and state, ranging from being outstanding members of the professions to laborers, going through the gamut . . . you name it.
>
> . . . .
>
> Most of the people with whom they work do not know they are participating in methadone

> treatment programs. They have no awareness of it, just as I am sure . . . there are many people in the agencies that are involved in this suit that too have numerous participants in methadone treatment programs, but they are non-visible . . . .

Tr. 1/28/75, pp. 627-29, CA 1918-20a. Dr. Joseph's testimony was confirmed by a number of other witnesses. They and Dr. Joseph listed examples of ordinary employment positions successfully held by methadone maintenance patients ranging from machine workers to truck drivers to attorneys. E.g., Tr. 2/3/75,p. 1051, CA 2170a; Tr. 2/7/75, pp. 1112-13, 1190-91, CA 2228-29a, 2306-07a.

Evidence was also received about methadone patients' successful work experiences under referral relationships that methadone programs have established with many willing employers in the New York City area--including, for example, Chemical Bank, New York Life Insurance, Metropolitan Life Insurance, J. C. Penney, McGraw-Hill, Seagram, Columbia Presbyterian Hospital, Consolidated Edison, New York Telephone and the Off-Track Betting Corporation. Pet. 44a; Tr. 10/25/74, pp. 421-22, CA 795-96a. A number of these employers testified at trial, and, contrary to the Transit Authority's claims here, their testimony was persuasive that methadone patients perform as well as the general population.

An official of the Sheet Metal Workers Union testified that his organization had accepted methadone

maintenance patients into positions involving the use of welding equipment and hazardous machinery, often at great heights with little or no supervision. Their job performance had been "uniformly excellent" and indistinguishable from that of drug-free individuals. Tr. 10/24/74, p. 333, CA 736-40a, 743a, Pl. Ex. 38.

A vice president of the New York City Off-Track Betting Corporation (OTB), testified about the experience that OTB had had with two of its offices staffed entirely by former addicts, about half of whom were maintained on methadone. Tr. 10/29/74, p. 637, CA 1207-09a, 1212a, Pl. Ex. 44. Even though they were specifically selected from a former addict group considered as "hard core unemployable," the performance of their offices was "indistinguishable from other OTB branches." CA 1207a, 1209a. On the basis of this experience, OTB had concluded that "neither former drug history alone . . . nor participation in . . . methadone maintenance treatment was a reason to disqualify a person from work with large amounts of cash in an essentially unsupervised high stress situation." CA 1209a.

The assistant vice president and medical director of the Consolidated Edison Company testified that Con Ed had knowingly hired about 100 former addicts, many of whom were methadone maintenance patients. These employees worked in a wide variety of positions and were eligible for advancement along normal promotional lines.

Con Ed believed its experience with former heroin addicts had been successful, and a controlled study of the work performance of methadone maintained employees indicated that it was as good as or better than average. Pet. 43a; Tr. 10/25/74, p. 568, CA 1145-48a, 1150a, Pl. Ex. 39.

The favorable testimony of these and other employer witnesses was uncontroverted. The Transit Authority did not produce a single witness who had reached negative conclusions about the work performance of methadone patients.

E. Ability of the Transit Authority to Select Particular Methadone Maintenance Patients for Employment

"Intensive inquiry" by the district court established that the Transit Authority and its existing medical staff is capable of selecting methadone maintenance patients for jobs "in basically the same way as . . . other prospective employees." Pet. 46a; Tr. 1/2/75, p. 520, CA 1798a; Tr. 2/3/75, p. 1005, CA 1831a. Indeed, due to the extensive screening information available from treatment programs the Transit Authority can be more assured of the employability of particular methadone maintenance patients than of other job candidates.

The Transit Authority's ordinary employee screening procedures include written, physical, and medical examinations, and probationary performance evaluations.[35/] For positions involving skilled work or high level responsibility the Transit Authority also demands proof of recent, directly related prior work experience. Tr. 2/12/75, p. 1467, Pl. Ex. 60.

Under the district court's judgment, the Transit Authority has wide discretion to incorporate in its screening procedure any reasonable selection criteria with respect to methadone maintenance patients that it deems appropriate, specifically including a requirement that applicants have had a successful treatment record in a reliable methadone maintenance program for a year or other time period. Pet. 76-77a. The Transit Authority is also free to require the transmittal of detailed information about the applicant from the particular methadone program involved. The evidence is that such information would enable the Transit Authority to know far more about methadone job applicants' reliability and freedom from substance abuse than it does for other persons.

35/ Tr. 2/12/75, pp. 1261, 1284-85, 1287-92, 1365, 1442-43, 1454-55; Tr. 1/31/75, pp. 820-22, CA 2042-44a, 2063a.

Under federal and New York law, methadone maintenance patients are required to visit their treatment programs at least six days each week for their first three months in treatment. The frequency of these visits may be reduced gradually over a period of two years but at no time to less than twice per week. CA 3163a, 3146-47a.[36/] At their program visits patients are closely observed by professional personnel, randomly given urinalyses to check for drug use (at least once weekly under federal and New York law), and engaged in a program of vocational and personal counseling.[37/] The result is that methadone programs have a wealth of information about their patients' dependability that is potentially available to employers. As the court noted, methadone maintenance patients are "under scrutiny far greater than is usually given almost any other human being in normal walks of life." Tr. 1/13/77, p. 172, CA 503a.

36/ The federal regulations reproduced in the court of appeals appendix have been republished at 42 Fed. Reg. 46698 et seq. (Sept. 16, 1977) for the purposes of future recodification at 2. C.F.R. 291.505 et seq.

37/ Tr. 10/22/74, pp. 15-19, CA 535-39a; Tr. 2/7/75, pp. 1082-87, CA 2198-2203a; 2/12/75, pp. 1372-77, CA 2327-32a; Tr. 2/3/75, pp. 927-30, 1016-17, 1047-48, CA 2107-10a, 2140-41a, 2166-67a.

Even some of the most outspoken critics of methadone maintenance treatment admit that the information methadone programs have about their patients far exceeds that which is available when an employer normally selects a job candidate. For example, Irving Lukoff, a court's witness and the person largely responsible for an apparently critical article regarding methadone that had earlier concerned the court, testified:

> In every [methadone] program they have much more information than most personnel people have in the ordinary course of their selection of people. They know whether they have been abusing the drugs in the program. They know their criminal histories. They have had contact with them on a weekly, sometimes daily basis for many months, and they have a great deal of information to understand the individual.

Tr. 10/25/74, p. 456, CA 836a. Lukoff's testimony was confirmed by Drs. DuPont[38/] and Dole[39/] and by Dr.

38/ Q. Can participants in methadone maintenance treatment programs be screened for job reliability with the same degree of certainty that . . . the non-drug user walking in off the street can be screened for job reliability?

A. The answer is yes, and I think you actually have more--the employer has more knowledge about him as a potential [employee] because of the potential involvement of the treatment agency in making those judgments. So actually he

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Rosenthal, another court's witness and critic of methadone maintenance. Tr. 1/10/75, pp. 420-21.

It is clear, as the district court noted, that those employers who have assessed their experience with methadone patients as employees have not found evaluation of their employability a problem. Pet. 50a. Thomas Doyle, of Con Edison, and Eileen Wolkstein of Beth Israel Methadone Maintenance Treatment Program, described to the court the successful performance of employees screened on the basis of criteria no more complex than nine months' methadone treatment, a recent significant work history, and no overt behavioral or psychiatric problems. Tr. 10/25/74, p. 568, Pl. Ex. 39, CA 1145-48a, 1150a; Tr. 10/25/74, p. 426-33, CA 799-806a. Robert Schluter of the Sheet Metal Workers Union testified that he had selected "excellent" apprentices using only a six month treatment standard and requiring patients to divulge the identities of their drug treatment

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has more information on which to base his judgments than he would for somebody who is coming off the street.
Tr. 10/22/74, p. 38, CA 558a.

39/ "You know more about a man coming to a methadone clinic than virtually any other human contact that you will have with another human being." Tr. 1/7/75, p. 95, CA 1576a.

counselors and make available their drug detection urinalysis records. Tr. 10/24/74, p. 333, Pl. Ex. 38, CA 736-40a, 743a. Doyle's and Schluter's testimony was reinforced by Beny Primm, M.D.--executive director of the Addiction and Research Treatment Corporation, which treats the "hardest core" addicts--who testified that any physician would be able to evaluate an individual's addiction and treatment history on the basis of medical records supplied by his methadone program. Tr. 1/27/75, pp. 520-23, CA 1798-1801a.

As for any specific question that an employer such as the Transit Authority might have regarding whether information about patients had been supplied by reputable clinics, Dr. Primm explained that the determination was "not very difficult" and could be easily done by a Transit Authority physician relying on an easily accessible medical grapevine and a list of programs inspected for compliance with strict state and federal regulations. Tr. 1/27/75, pp. 524-26, CA 1802-04a. Dr. Dole agreed that the regulatory agencies could be relied on in this regard. Tr. 1/7/75, pp. 22-24, CA 1502-04a.

In its brief the Transit Authority has ignored the one-sided evidence regarding the ease of methadone patient screening, and has instead proffered the testimony of Drs. Trigg, Dole and Gollance for the proposition that "the expert witnesses agreed" that an employer would need "an unusual amount of advice and help" to

hire a methadone patient. (Pet. Br. 23-24). The testimony of these doctors is referred to totally out of context. For example, Dr. Trigg, as the Transit Authority claims (Pet. Br. 24), did testify regarding his interest in a former addict certification board. But Dr. Trigg also testified that it is easy for a methadone program to identify problem patients, that programs identify them within a year, and that as an employer he would find the recommendations of all public methadone programs reliable. Tr. 1/10/75, pp. 369-61, 402-04. He further testified that screening could be done reliably by a single physician in cooperation with the patient's program (Tr. 2/3/75, p. 857-58), and he specifically corroborated Dr. Primm's testimony that program reliability could be assessed through government information and the medical grapevine. Tr. 2/3/75, p. 858-59. The Transit Authority's citations to Dr. Dole and Dr. Gollance fare no better.[40/]

40/ Dr. Dole's and Dr. Gollance's testimony cited by the Transit Authority about an employer's need for an unusual amount of help from someone experienced in the methadone field was in response to the court's questions about how an employer could evaluate a methadone job applicant who had a very short treatment record. Tr. 1/7/75, pp. 95-97, CA 1576-78a; Tr. 1/9/75, p. 155, CA 1634a. It is this type of applicant that the Transit Authority under the court's judgment has discretion to

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The Transit Authority's claim that methadone programs are prohibited from providing adequate information to employers (Pet. Br. 25-26) is similarly baseless. The governing federal regulations were specifically designed to permit employers to obtain the information needed for rational employment decisions. CA 362-64a; 3185a; Pet. 50-51a.[41/] And when employers have sought information it has been fully provided on both a pre-employment and follow-up basis. E.g., Pet. 50a.[42/]

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exclude completely. It should be noted that during his testimony Dr. Dole observed that a methadone patient who had received the benefit of treatment for only six months was, nonetheless, more employable than a culturally disadvantaged minority individual from the same neighborhood with no addiction history. Tr. 1/7/75, p. 103, CA 1584a.

41/ As the district court recognized, it is clear under 42 C.F.R. §2.38 that a patient may consent to the release of information relevant to employment to an employer or prospective employer. Pet. 50-51a. The restriction that programs not turn over information to employers who will use it to discriminate on the basis of a drug abuse history in no way precludes a program from reporting current abuse. Dr. DuPont's testimony cited by the Transit Authority (Pet. Br. pp. 25-26) concerning somewhat more restrictive confidentiality rules preceded the current regulations.

42/ The Transit Authority's claim that "all of the experts questioned at trial" testified that methadone

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Every leg of the district court's finding that the Transit Authority can reliably identify employable methadone patients through its regular screening procedures rests, as the court of appeals found, on overwhelming evidence. Pet. 2a. Indeed, given a fact finding

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clinics would give only very limited information to employers (Pet. Br. 25-26) is simply incredible.

Eileen Wolkstein, director of vocational rehabilitation for the Beth Israel Methadone Maintenance program (6,700 patients) explained that her clinics initially inform employers of a patient's history and how long the patient has been free from drug abuse, that they periodically provide reports containing any evidence of renewed drug abuse, and that they inform an employer whenever a patient is terminated from treatment. Tr. 10/25/74, pp. 424-26, 441-42, CA 797-99a, 814-15a. Thomas Doyle, on the receiving end of this information at Con Edison, specifically corroborated that his company had received reports from Beth Israel that contained drug detection urinalysis results and reports of missed medication. Dr. Doyle further stated he had never been denied any treatment information he had requested. Tr. 10/25/74, p. 572-73, CA 1154-55a. Joyce Lowinson, M.D., who runs the Bronx State methadone program, testified that her program also provides employers with a variety of information, specifically including reports of drug abuse. Tr. 2/7/75, p. 1102, CA 2218a.

The Transit Authority's citations to "experts" regarding the limited release of information result from misreadings or attempts at gross distortion.

The Transit Authority cites the testimony of Marybelle Perlman. In fact Ms. Perlman, a former

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process as comprehensive as that undertaken by the district court, this finding, like every other factual determination discussed above, was the only reasonable one that could have been made.

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counselor at a methadone program, testified that her program always brings problems such as drug abuse to an employer's attention. Tr. 2/3/75, p. 1050; CA 2169a. On cross-examination she stated that any release of information would be governed by regulations and that she would have to consult a lawyer before testifying further. Tr. 2/3/75, p. 1060-61, CA 2179-80a. This the Transit Authority cites as expert testimony that programs provide only attendance reports and progress evaluations.

The Transit Authority similarly miscites Dr. Joseph. In fact, he stated that methadone maintenance programs would cooperate with employers to the fullest extent consistent with federal law, with which he was not fully versed. Tr. 1/28/75, p. 670, CA 1961a.

The Transit Authority further miscites the testimony of Henry Biggart of the Off-Track Betting Corporation, which received referrals through an intermediary, the Vera Institute. Biggart testified that Vera had supplied information on missed medication or drug abuse. He did state that there had been confidential information that Vera had been unable to obtain, but he concluded that he had never been denied any information he felt necessary to the safe, efficient operation of his business. Tr. 10/29/74, p. 662-64; CA 1238-40a.

SUMMARY OF ARGUMENT

I

Congress has just expressly declared the blanket exclusion, by recipients of federal financial assistance, of former drug abusers from employment to be unlawful. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 §122(a)(6)(C),[43/] (amending the Rehabilitation Act of 1973 §7(6), 29 U.S.C. §706(6)). The legislative history of the 1978 Amendments makes explicit Congressional intent to protect former heroin addicts in methadone maintenance treatment from the discrimination prohibited by section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. 124 Cong. Rec. S 19002 (Daily Ed. Oct. 14, 1978) (Remarks of Senator Williams). This legislation applies to and clearly prohibits the Transit Authority's exclusionary methadone policy. Inasmuch as review of the policy's constitutionality, or legality under Title VII, would have no bearing on whether the Transit Authority or other employers may continue such practices, it is submitted that the adjudication of this case would not be "a provident expenditure

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43/ See note 45, infra, and accompanying text.

of the energies of the Court" and thus the writ should be dismissed. Triangle Improvement Council v. Ritchie, 402 U.S. 497, 502 (1971) (Harlan, J., concurring in dismissal of writ).

II

The Transit Authority's blanket denial of employment to fully rehabilitated heroin addicts who are being or ever have been treated in methadone maintenance programs violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Applying the well-established, minimum standard of judicial review under those clauses to an extensive record, the courts below correctly concluded that barring such individuals from ordinary, non-safety-sensitive jobs bears no rational relationship to any legitimate need of the Authority. That conclusion more than adequately supports the limited relief ordered below, which leaves the Transit Authority discretion to exclude methadone patients entirely from all sensitive jobs, to require a year of demonstrated successful treatment prior to consideration for other positions, and to require methadone patients to meet all other ordinary employment criteria.

Both the constitutional ruling and its factual underpinnings rest on an overwhelming record compiled in a

thoroughgoing manner by a district court with the utmost solicitude for the interests of the Transit Authority.

The court acted only after satisfying itself that the Transit Authority's absolute methadone policy was not the result of any deliberate decisionmaking process. On the contrary, the Transit Authority -- whose policy stood in sharp contrast to the employment policies of the New York State Civil Service Commission, the New York City Civil Service Commission, and the federal government, all of which provide for individualized job consideration of former drug abusers, including methadone patients -- had persistently refused to give any objective consideration to whether excluding methadone maintenance patients from its employ served its needs in any way.

Faced with this abdication, the district judge conducted a thorough search for a rational justification for the Transit Authority's policy, a search he carried well beyond the initial presentations of the adversaries to ensure that no basis for the policy went undiscerned. The district court's inquiry resulted in a record that conclusively establishes that methadone maintenance has no adverse effect whatsoever on an individual's behavior or job performance ability, that after a brief initial adjustment period the majority of methadone patients are fully employable, and that the Transit Authority can readily identify the employable methadone patients

through the very procedures it follows in evaluating other prospective employees.

In light of those findings it is clear that methadone maintenance itself implies no risk of poor performance or misconduct. There is simply no connection between the methadone policy and safety, efficiency, or any other conceivably relevant interest of the Transit Authority. The limited relief ordered, which affects only jobs the Transit Authority already deems suitable for alcoholics in treatment, diabetics, epileptics, and cardiac patients, confirms the absence of any impact on the safe operation of the transit system.

The Transit Authority's complete failure to consider whether any justification existed for its policy, and the total absence, as found by both courts below on detailed findings of fact and an extensive record, of any connection between the Transit Authority's policy and its needs distinguishes the instant case from those in which this Court has upheld a legislative classification as rationally related to a legitimate governmental objective. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); San Antonio Independent School District of Rodriguez, 411 U.S. 1 (1973). The constitutional judgment below reflects an extremely modest example of judicial review warranting this Court's affirmance.

III

The district court held, in the context of a motion for an award of attorney's fees, that the Transit Authority's methadone policy violates Title VII of the Civil Rights Act of 1964 in that it has a disparate adverse impact upon blacks and Hispanics and cannot be justified by business necessity. The substantial overrepresentation of blacks and Hispanics among that part of the population that is addicted to hard drugs or in treatment to overcome that addiction is not a statistical fluke: the high incidence of drug addiction, like the high rates of unemployment and infant mortality, has its origins in centuries of purposeful, debilitating racial discrimination.

The district court based its holding on statistical data that shows a gross disparity between minority representation in methadone maintenance programs (62-65%) and among Transit Authority employees and applicants suspected of violating its drug policy (81%) and minority representation in the population from which the Authority draws its employees (20%). The record amply supports the trial court's finding of disparate impact and the Transit Authority, which offered no countervailing evidence, cannot for the first time in this Court

challenge the completeness, accuracy, statistical significance or relevance of these data. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977).

Moreover, the possibility that the Transit Authority may have achieved racial balance in its work force cannot justify the use of a selection criterion that screens out minorities at a far higher rate than whites. The only justification for such a criterion is business necessity. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Transit Authority has never even attempted to determine whether methadone maintenance patients can perform the kinds of non-safety-sensitive jobs at issue in this case, and the trial court's holding that the Transit Authority's methadone policy bears no rational relationship to its business or safety needs is clearly supported by the record.

The extension by Congress of Title VII to public employers is supported by both the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment. Unlike the minimum wage law at issue in National League of Cities v. Usery, 426 U.S. 833 (1976), Title VII's prohibition of racial discrimination in employment represents a paramount national interest, in no way interferes with the "integral governmental functions" of states or cities, id. at 851, imposes no costs on complying

jurisdictions, and therefore does not exceed Congress's power under the Commerce Clause.

The application of Title VII's discriminatory effect test to state and local governmental employers was also a proper exercise of Congress' power under section 5 of the Fourteenth Amendment. It has long been recognized that Congress has the power to make findings and to prescribe remedial measures for past discrimination which go beyond the dictates of the Constitution. E.g., South Carolina v. Katzenbach, 383 U.S. 301 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970).

ARGUMENT

I

CONGRESS HAS JUST EXPLICITLY DECLARED THAT PRACTICES LIKE THAT OF THE TRANSIT AUTHORITY ARE UNLAWFUL UNDER THE REHABILITATION ACT OF 1973. THE QUESTION OF THE CONSTITUTIONALITY OF THE POLICY IS OF NO FUTURE PRACTICAL SIGNIFICANCE AND THE WRIT SHOULD BE DISMISSED.

Petitioners and amicus American Public Transit Association attempt to create the impression that this Court's decision will decide whether the New York City Transit Authority, and similar systems across the country, will have to give individualized consideration to the employment of methadone maintenance patients and other former heroin addicts. This Court may decide whether the Constitution or Title VII invalidates the Transit Authority's methadone policy. The Congress of the United States, however, has removed from the judiciary the question of whether that policy violates federal law and answered, quite simply, yes.

Enacted subsequent to the acts of discrimination suffered by the named plaintiffs, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap . . . be subjected

to discrimination under any program or activity receiving Federal financial assistance."[44/] On April 12, 1977, the Attorney General of the United States issued an opinion, based on extensive analysis of the legislative history, that drug addicts are "handicapped individuals" protected by the antidiscrimination provision of section 504. Br. Opp. Cert. A5.

On October 14, 1978, both houses of Congress confirmed that otherwise qualified persons with histories of drug abuse are protected by section 504, by voting to amend section 7(6) of the Rehabilitation Act, 29 U.S.C. §706(b), to provide:

> . . . Subject to the second sentence of this subparagraph, the term 'handicapped individual' means, for purposes of titles IV and V of this Act, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser

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44/ According to the most recently published report of the Metropolitan Transportation Authority, for the fiscal year ended June 30, 1976 the New York City Transit Authority received more than $135 million in federal funds for operating assistance from the Urban Mass Transit Administration. Metropolitan Transportation Authority Annual Report-1976, pp. 51, 53.

> whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Conference Report on H.R. 12467, the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Sec. 122(a)(6)(C), 124 Cong. Rec. H 12675 (Daily Ed. Oct. 12, 1978), adopted by House of Representatives, 124 Cong. Rec. H 13476 (Daily Ed. Oct. 14, 1978), and by Senate, 124 Cong. Rec. S 19002 (Daily Ed. Oct. 14, 1978).[45/]

45/ This bill, which contains extensive amendments to the Rehabilitation Act of 1973, has not, as of this writing, been signed by the President. Whether the package is enacted into law or not, this particular provision remains an expression of Congressional approval of the Attorney General's opinion (Br. Opp. Cert. A 5) that qualified persons with histories of drug addiction are to be considered handicapped persons protected by section 504 of the Rehabilitation Act.

> [W]hile the legislative history of the 1973 act, as authoritatively interpreted by the Attorney General, made clear that qualified individuals with conditions or histories of alcoholism or drug addiction were protected from discrimination by covered employers, this amendment codifies that intent.

124 Cong. Rec. S19001 (Daily Ed. October 14, 1978) (Remarks of Senator Williams).

The purpose of the amendment was stated by Senator Williams:

> This amendment is designed to make absolutely clear that employers covered by the act must not discriminate against those persons having a history or condition of alcoholism or drug abuse who are qualified for the particular employment they seek.

124 Cong. Rec. S 19001 (Daily Ed. Oct. 14, 1978.)

The fact findings of Congress closely parallel those of the trial court in the instant case:

> The experience of treatment professional and major employers alike has demonstrated that many recovered alcoholics and drug abusers perform competently and reliably in the full range of tasks, skilled or unskilled, hazardous or not, that make up the job market.
>
> . . . From the Federal experience with drug abuse treatment, it is abundantly clear that substantial numbers of former heroin addicts are fully capable of safe, efficient job performance and are readily identifiable. A blanket refusal to hire these individuals cannot be justified.

Id. at S 19001-02. Moreover, Congress addressed itself specifically to the question of discrimination against methadone maintenance patients:

> . . . [A]n employer cannot assume that a history of alcoholism or drug addiction, including a past addiction currently treated by methadone maintenance, poses sufficient danger in and of itself to justify exclusion. Such an assumption would have no basis in fact and the act does not permit it.

Id. at S 19002.

These statutory requirements go far beyond the individualized consideration of certain methadone patients for non-sensitive jobs ordered by the district court. In the light of these developments, review of the Transit Authority's absolute exclusionary policy can have no impact on its present or future legality.

This Court has not hesitated to dismiss the writ where supervening events have deprived the case of the "special and important reasons" for review required by Rule 19. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 73 (1955). Although the Rehabilitation Act was discussed in Respondents' Brief in Opposition to Certiorari (pp. 26-28), only the subsequent passage of the clarifying amendment made it absolutely clear that the Act applies to practices like those of the Transit Authority. Thus, this is a case where "further study of the law [previously before the Court] discloses that there is no need for an opinion of this Court on the questions presented by the petition." Burrell v. McCray, 426 U.S. 471, 472 (1976) (Stevens, J., concurring in dismissal of the writ).[46/]

46/ See also Cook v. Hudson, 429 U.S. 165, (1976) (writ dismissed where previously raised statute deemed significant when reviewed in light of a subsequent decision of

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In view of the diminished significance of the legal issues before the Court, this becomes a particularly appropriate case for dismissal of the writ given the factual nature of the Transit Authority's argument.

> In Newell v. Norton, 3 Wall. 257, 18 L.Ed. 271, Mr. Justice Grier stated the considerations weighing against Supreme Court review of factual determinations: 'It would be very tedious as well as a very unprofitable task to again examine and compare the conflicting statements of the witnesses in this volume of depositions. And, even if we could make our opinion intelligible, the case could never be a precedent for any other case, or worth the trouble of understanding.' 3 Wall. at page 267.

Dick v. New York Life Insurance Co., 359 U.S. 437, 454 (1959) (Frankfurter, J., dissenting on ground that the writ should have been dismissed as improvidently granted).

Although the particular legal issues raised by this case are not affected by the Rehabilitation Act as recently clarified, the determination of those issues will

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this Court); Triangle Improvement Council v. Ritchie, 402 U.S. 497, 499-500 (1971) (Harlan, J., concurring in dismissal of the writ) (new statute, modeled after the one before the Court when it granted the writ, altered potential impact of a decision); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 (1955) (writ dismissed once significant legislation, cited to the Court before the grant of the writ, was placed in proper "perspective").

have no bearing on whether the Transit Authority or other employers may continue the practices involved here; therefore, the dispute between the individual litigants is better left to the disposition of the courts below. "This Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." Rice, 349 U.S. at 74; see also, Triangle Improvement Council, 402 U.S. at 499 (Harlan, J., concurring in the dismissal of the writ).

Accordingly, inasmuch as "the exercise of [the Court's] power of review would be of no significant continuing national import," respondents respectfully submit that this Court should dismiss the writ of certiorari. Triangle Improvement Council, 402 U.S. at 499 (Harlan, J., concurring).

II

THE DECISIONS BELOW THAT THE TRANSIT AUTHORITY'S METHADONE POLICY IS UNCONSTITUTIONAL REST SOUNDLY ON APPLICATION OF THE TRADITIONAL "RATIONAL BASIS" STANDARD TO OVERWHELMING EVIDENCE AND MUST BE AFFIRMED.

The district court stated its conclusion, which the court of appeals affirmed, quite simply:

> [T]he blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.

Pet. 19a. Both well established law and thoroughly demonstrated fact required that conclusion.

In the first place, the courts below tested the Transit Authority's policy by the traditional "rational basis" standard of review under the Equal Protection and Due Process clauses of the Fourteenth Amendment, not by any heightened or "strict" scrutiny.[47/] Moreover, the

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47/ Because any substantive due process limit on public employment criteria created by the Fourteenth Amendment liberty interest in employment, see note 53, infra, would appear to be no more strict than the limits imposed by the Equal Protection clause, plaintiffs cast the remainder of their argument in equal protection terms for convenience.

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district judge scrupulously avoided substituting his empirical powers and policy judgment for those of the Transit Authority. Rather, prompted only by the past and continued refusal of the Transit Authority to consider whether any justification existed for its policy, the district court conducted the most thorough possible canvassing of evidence regarding methadone maintenance, pro and con, expressly to ensure that no basis for the Transit Authority's policy went undiscovered. That exhaustive search brought forth overwhelming evidence negating any relationship between the methadone policy and each of the full range of justifications that could be conceived in its support. Only then did the court grant plaintiffs limited relief, leaving the Transit Authority

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While it is true that no procedural due process claim is before this Court, Pet. Br. 35, plaintiffs note that the administrative hearings provided Beazer and Reyes were confined solely to determining whether they had violated the Transit Authority's rule against narcotic usage. Their participation in methadone maintenance treatment, in the Transit Authority's interpretation, made the conclusion obvious. The hearings were but mechanical applications of the methadone policy and in no way constituted individualized determinations of qualification for employment. Indeed, as the district court pointed out, the hearing board specifically found that Beazer was performing competently while participating in methadone maintenance, but had no choice under the methadone policy other than to approve his termination. Pet. 13a-14a.

broad discretion to set employment standards that will rationally serve its needs.

Clearly, the judgment below constitutes judicial review of a very modest sort and warrants this Court's affirmance.

A. The Courts Below Applied the Rational Basis Standard of Constitutional Review.

The Transit Authority has suggested to this Court, for the first time in the long history of this litigation,[48/] that the courts below erroneously subjected its methadone policy to the "strict scrutiny" standard of review. Pet. Br. 39-41; Pet. 13. The suggestion requires but brief rebuttal.

Under the Equal Protection Clause of the Fourteenth Amendment, all governmental classifications must meet the "rational basis" standard of judicial review. See Maher v. Roe, 432 U.S. 464, 470 (1977); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973). The "rationality"

48/ See Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970) (the Supreme Court will not ordinarily consider issues neither raised before nor considered by the court of appeals).

test requires the revewing court to determine whether the classification in issue

> rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination.

Rodriguez, 411 U.S. at 17; quoted with approval in Maher v. Roe, 432 U.S. at 470.[49/]

The plain language of the opinions below makes obvious that the district court and the court of appeals applied this standard and no other. The district court stated the standard of review as follows:

> A public entity such as the TA cannot bar persons from employment on the basis of criteria which

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49/ In light of the clear application of the rational basis standard --not strict scrutiny—by both courts below and the equally clear invalidity of the Transit Authority's policy under that standard, plaintiffs need not enter the debate whether some third, intermediate level of review is also implicit in the Equal Protection clause. See, e.g., Craig v. Boren, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring); id. at 211-12 (Stevens, J., concurring); id. at 220-21 (Rehnquist, J., dissenting); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting). Plaintiffs would only note that commentators have discerned in this Court's most recent applications of the rational basis standard itself a recognition that that test requires meaningful, albeit limited, judicial review. See e.g., G. Gunther Constitutional Law — 1978 Supplement 216-17. The precise content of the rational basis standard is discussed more fully in part I.B., infra.

have no rational relation to the demands of the jobs to be performed.

Pet. 64a (emphasis added). The court of appeals affirmed the "district court's conclusion of law . . . that the TA's methadone rule has 'no rational relation to the demands of the jobs to be performed.'" Pet. 2a-3a.[50/]

Nothing in the opinions below suggests that their authors meant anything other than what they said.[51/] The contention that the district court's careful review of the evidence somehow equates with heightened scrutiny is plainly wrong. Had the district court determined that

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50/ The district court's conclusion that the methadone policy was not "rationally related to the safety needs, or any other needs, of the TA", Pet. 19a, also reflects recognition of the appropriate standard. Indeed the district judge's statements during the trial proceedings demonstrate his awareness of the appropriate level of review. See, e.g., Tr. 11/27/74, p. 22 ("...there were lots of jobs that really weren't covered by anything that has been told to me so far as to any rational reason why methadone people can't be employed.")

51/ The citations in the opinions below to Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Sugarman v. Dougall, 413 U.S. 634 (1973); and Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976), do not reflect strict scrutiny. In the first place, the opinions below must be judged on the basis of the standard they articulate and apply, not by assuming the authors adopted whatever references to heightened scrutiny the cited decisions contain. Second, the district court's discussion of

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strict scrutiny was appropriate, concluding that the methadone policy was invalid would have required no extended analysis. That conclusion would have followed almost reflexively, given the policy's overinclusiveness. The court's exhaustive canvassing and careful review of evidence concerning both methadone maintenance and Transit Authority employment proceeded, not from a determination to apply strict judicial scrutiny, but from the view that it could properly invalidate the Transit Authority's policy only if thoroughly convinced that no rational basis could be found to support it.

The Transit Authority's eleventh hour attempt to rewrite the decisions below is an unpersuasive effort to interject controversy where there was none. All parties urged the courts below to test the Transit Authority's policy by the limited "rational relationship" standard.[52/] The district court noted that "[t]here is no basic dispute

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LaFleur and Dougall focused specifically on references in those decisions to "rationality" review. Pet. 64a-65a. See LaFleur, 414 U.S. at 651-53 and n.2 (Powell, J., concurring); Dougall, 413 U.S. at 647. Similarly, Crawford, relied on by the court of appeals, expressly followed Justice Powell's "rationality" concurrence in LaFleur. 531 F.2d at 1122-23.

52/ See Brief of Plaintiffs-Appellees to the Second Circuit at 36-37; Brief of Defendants-Appellees to the Second Circuit at 19.

among the parties as to the constitutional doctrines which apply to the present case." Pet. 64a. The court of appeals recognized the same: "There was no dispute over the governing constitutional doctrines. . . ." Pet. 5a.

In short, there was no controversy over the governing constitutional standard below, and there is in fact none here. The real constitutional question before this Court is whether the district court correctly concluded that the methadone policy bore no rational relationship to any legitimate governmental interest. The painstakingly unintrusive posture assumed by the district judge and the record he compiled, not simply the naked declaration of a standard of review, require that that question be answered in the affirmative.

B. The Courts Below Correctly Concluded That the Transit Authority's Methadone Policy Bore No Rational Relationship to Any Legitimate Governmental Interest.

In Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976), this Court made clear that classifications on which a public body conditions employment must meet the test of rationality or else fall before the Equal Protection Clause of the Fourteenth Amendment. See also McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). The classification in

Murgia withstood that test because it "rationally further[ed] the purpose identified by the State. . . ." Id. at 314.

In the case at bar, on the contrary, the district court assembled a comprehensive record on every conceivably relevant interest of the Transit Authority and correctly decided that its methadone policy was rationally related to none. That record compelled the findings of fact on which the court predicated its decision. The constitutional ruling, in turn, followed ineluctably from those findings.[53/]

53/ In urging this Court to affirm the determinations made below under the rational basis standard, plaintiffs by no means intend to denigrate the interests here at stake or to gloss over the unfairness with which the Transit Authority and others have long stigmatized them.

This Court has recognized that an individual's interest in employment falls within the concept of liberty guaranteed by the Fourteenth Amendment. See Murgia, 427 U.S. at 323 (Marshall, J., dissenting); Board of Regents v. Roth, 408 U.S. 564, 572 (1972). Employment is of peculiar importance to the plaintiff class. Plaintiffs have never contended, and the courts below in no way ordered, that the Transit Authority must be party to drug abuse rehabilitation or that it must hire anyone other than a fully qualified, reliable individual. Nevertheless, employment is obviously the critical final step in the reintegration of rehabilitated addicts into legitimate society, which the Transit Authority's policy denies even

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1. The district court findings of fact rest on overwhelming evidence compiled through thorough investigation and warrant this Court's acceptance.

The court of appeals concluded that the record assembled during this trial

> overwhelmingly supports the trial court's findings that, after a brief initial period of adjustment, many former heroin addicts on methadone maintenance are employable and that identification of those who are employable is readily accomplished through regular personnel procedures.

Pet. 2a. Upon these and subsidiary fact findings, the district court predicated its conclusion that the Transit Authority's methadone policy is not rationally related to any of its legitimate needs.

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to those who are demonstrably ready. Because methadone maintenance is a form of medical treatment that may last years or indefinitely, the consequences of the Transit Authority's policy are severe indeed.

Such policies do not arise out of mere happenstance. Society unquestionably casts a stigma on former addicts, and individuals with a history of drug abuse continue to face the widespread discrimination that has long confronted them in the employment sector and elsewhere. As Dr. DuPont testified, pursuading employers to judge rehabilitated addicts on the basis of individual merit "is very difficult because of the general prejudice about somebody who has a history of drug use." Tr. 10/22/74, p. 99. See also Temporary State Commission to Evaluate the Drug Laws, supra note 13, at 27 ("widespread irrational discrimination on an unyielding and categorical basis.")

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The brief of the Transit Authority consists largely of attempts to impugn these findings by culling shards of purportedly contrary evidence from the substantial record assembled below. This tactical departure need not long detain the Court. As the court of appeals noted, "[o]n appeal the TA [did] not challenge any of Judge Griesa's findings as factually erroneous, nor could it in view of the one-sided record before us." Pet. 2a. This Court should not set aside facts conclusively found by the district court, affirmed by the court of appeals, and unchallenged by the Transit Authority until the present. See e.g., Blau v. Lehman, 368 U.S. 403, 408-09 (1962); United States v. Commercial Credit Co., Inc., 286 U.S. 63, 67 (1932).

In the ordinary case the Transit Authority's attempt to retry factual issues in the Supreme Court

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Such long-standing stigmatization bears on the Equal Protection Clause and the underlying "basic concept of our system that legal burdens should bear some relationship to individual responsibility . . ." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972), quoted in Craig v. Boren, 429 U.S. 190, 212 n. 2 (1976) (Stevens, J., concurring). In applying this principle to the case at bar, plaintiffs urge that this Court consider that, whatever the genesis of addiction, the judgment below protects only those individuals who have shouldered responsibility and distinguished themselves from any group that might reasonably be thought to share a characteristic that would justify the denial of employment.

would require no extended comment. For, in light of the extensive record as described supra, there can be no serious contention that any of the district court findings of fact are "clearly erroneous." Fed. R. Civ. P. 52(a). 54/

Nevertheless, plaintiffs stress that they do not invoke Rule 52(a) as a cloak for concealing a district court's substitution of its assessment of complicated empirical data or its evaluation of policy priorities for those of the Transit Authority. No such substitution took place. On the contrary, the district judge stepped in only when convinced that the Transit Authority would persist

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54/ Indeed, in language befitting the case at bar, this Court has followed the "clearly erroneous" rule with respect to facts of such constitutional consequence as the sectarian or nonsectarian nature of a school:

> We cannot say that the foregoing findings as to the role of religion in particular aspects of the colleges are clearly erroneous. Appellants ask us to set those findings aside in certain respects. Not surprisingly, they have gleaned from this record of thousands of pages, compiled during several weeks of trial, occasional evidence of a more sectarian character than the District Court ascribes to the colleges. It is not our place, however, to reappraise the evidence, unless it plainly fails to support the findings of the trier of facts.

Roemer v. Board of Public Works, 426 U.S. 736, 758 (1976) (plurality opinion of Blackmun, J.) (emphasis added).

in its total refusal to consider whether its policy could be justified. Even then he insisted on proceeding beyond the presentation offered by the adversaries, in order to ensure that no rational basis for the methadone policy went undiscovered. When this process is examined, it becomes clear that the findings of fact satisfy a much more demanding standard than the "clearly erroneous" test. As the court of appeals found, they are "overwhelmingly support[ed]" by the evidence. Pet. 2a. Indeed, no reasonable fact finder -- judicial, legislative, or administrative --could have concluded otherwise.

The fact finding process here began with the Transit Authority's refusal to evaluate its methadone policy from the time the policy was adopted through the close of the trial. As previously explained in detail,55/ the methadone policy began as a mechanical extension of the Transit Authority's rule against narcotics use. Thereafter the Authority gave thought only to enforcement of the policy, never whether the policy itself was in any way warranted.

The Transit Authority's abdication places this case in wholly different circumstances from those in which this Court has given substance to the presumption that

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55/ See pages 16-24, supra.

governmental acts are constitutional.[56/] The Transit Authority made no rough accommodation of competing interests, acted upon no responsible study. In fact, the policy stands on no accommodation or study at all. The

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56/ In upholding Texas' property tax system of school financing in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 55 (1973), the Court elaborated on the presumption of constitutionality:

> The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified poeple. In giving substance to the presumption of validity to which the Texas system is entitled, . . . it is important to remember that at every stage of development it has constituted a "rough accommodation" of interests in an effort to arrive at practical and workable solutions. . . .

(citations omitted). The circumstances surrounding the Transit Authority's methadone policy were quite the contrary, as the text above makes clear.

Not only are the factors noted in Rodriguez missing in the specific circumstances of the case at bar, but a more general basis for the presumption is also absent. The presumption of constitutionality may be difficult to overcome with regard to acts of a legislature in part because the formal requirements and political constraints inherent in the legislative process provide some assurance that relevant points of view are aired and considered. That assurance is lacking in the case of administrative bodies or public agencies such as the Transit Authority.

district court had no choice but to step into this vacuum and to determine himself if a rational basis existed for the methadone policy.[57/]

57/ In light of the long-standing discrimination against persons with a history of drug abuse, see note 53, supra, and the unthinking equation of methadone maintenance with heroin addiction, it is not surprising that the Transit Authority has never seriously considered whether that policy is justified:

> [A] traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. . . . But that sort of stereotyped reaction may have no rational relationship — other than purely prejudicial discrimination — to the stated purpose for which the classification is being made.

Matthews v. Lucas, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting).

Indeed, the Transit Authority's policy stands in sharp contrast to those area agencies most directly concerned with establishing criteria for public employment. The policy of both the New York City Civil Service Commission and the New York State Civil Service Department is to consider applications for employment from persons with an addiction history, including current methadone patients, on their individual merits. A history of drug abuse is not itself a bar to employment, outside of a few safety-sensitive positions. Pet. 51a-52a. See also N.Y. Civ. Serv. Law §50.4(c) (McKinney) (only persons addicted to the unlawful use of narcotics may be excluded from state and local civil service positions). The lack of effect of the City's policy on the Transit Authority is described at note 19, supra. Similarly, federal employment may not be denied on the sole ground of prior drug abuse. 21 U.S.C. §1180. In fact,

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However, the district judge continued to impose a heavy burden of persuasion on plaintiffs on each factual issue. Indeed, he refused to allow the constraints of the adversary structure of civil litigation to mislead him into overlooking a basis for the Transit Authority's policy. As the parties drew their presentations to a close, the judge commented:

> What I am really saying is that if this were a case about who owned a diamond ring, then let the litigant -- the adversary process would take over, and if the plaintiffs put on the best proof -- the Court doesn't have to worry about whether enough evidence is brought in. Let the parties put on what they want and leave it at that. But this isn't a case about who owns a diamond ring; this is a case that I fell [sic] -- and I don't want to exaggerate its importance, but I think this is a case of, really, extreme public interest, ...
>
> Both sides raise questions which are really very important to the public interest.
>
> I want to get my questions answered and I fell [sic] that if the parties themselves do not put on adequate proof, I am going to take steps to get it, and I don't think I have gotten the whole story on

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recent federal legislation clearly prohibits recipients of federal financial assistance, which includes the Transit Authority, from maintaining exclusionary policies like the one invalidated below. An argument that this legislation not only confirms the irrationality of the Transit Authority's policy but warrants dismissal of the writ of certiroari is made at part I. supra.

> methadone, I don't think I have gotten the whole story on methadone clinics. . . .

Tr. 11/27/74, p. 28-29. s described above,[58/] nine trial days followed, during which all relevant issues were thoroughly aired through witnesses of varying points of view called by the court as well as the parties.

In sum, the district judge did not substitute his personal judgment for that of the Transit Authority. Acting only when satisfied that no independent judgment had been made by the employer, he laboriously searched the field lest he miss a justification for the methadone policy. This deferential posture is not without relevance to the appropriate measure of review to be given his conclusions of fact. Cf. Hutto v. Finney, 98 S.Ct. 2565, 2572-73 (1978) (district court's exercise of discretion "is entitled to special deference because of the trial judges' . . . recognition of the limits on a federal court's authority"). In these circumstances, the district court must have some latitude to resolve the factual issues that bear on a determination whether any rational connection exists between the wholesale exclusion of methadone patients from the Transit Authority's employ and any of the Transit Authority's legitimate interests.

58/ See note 5, supra and accompanying text.

As the court of appeals found, the record "overwhelmingly supports" the district court's crucial factual conclusions -- that substantial numbers of methadone patients are employable and are readily identifiable as such through the Transit Authority's ordinary screening procedure. Pet. 2a. The statement of the "Fact Findings and Record Below", pp. 12-57, supra, exposes in detail the irrelevance and inaccuracy of the Transit Authority's claims regarding the record and fully rehearses the wealth of evidence those claims overlook. That discussion speaks for itself. It suffices here to say that where a federal district judge has shown such conscientious solicitude for the interests of a public employer yet finds after thorough search that the evidence not only permits, but compels certain findings of fact, there can be no basis -- in considerations of comity, separation of powers, or democratic theory -- for rejecting those findings. A contrary rule would serve only as an incentive to policymaking bodies to proceed without thought, confident that isolated remarks or a favorable witness could always be found to vouchsafe whatever decisions the institution had blundered into.

2. The legal conclusions below that the methadone policy violates the Equal Protection test of rationality are correct.

While the rational basis standard is a relatively lenient measure of review, this Court's recent applications of the test, even in upholding legislative classifications, have carefully examined purported connections to government interests to ensure that a rational nexus existed in fact. See, e.g., Ohio Bureau of Unemployment Services v. Hodory, 431 U.S. 471, 489-93 (1977) Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). Such review is imperative if the standard is to retain any meaning:

> Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, [would make] equal protection analysis no more than an empty gesture.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 68 (1973) (White, J., dissenting).

The district court, as affirmed by the court of appeals, correctly concluded that the Transit Authority's methadone policy could not meet this limited standard. In the first place, the methadone policy reflects anything but "the product of a deliberate and rational choice which [the Transit Authority] had the constitutional power to make." Alexander v. Fioto, 430 U.S. 634, 640

(1977).[59] Moreover, the district court eschewed any reassessment of the legitimacy or importance of the interests of the Transit Authority. The court accepted the legitimacy of every proffered interest and tested only for the existence of any connection between each interest and the methadone policy. In every case the court found the connection woefully lacking.

The court began from the two factual premises, see part II.B.1., supra, that after an initial adjustment period a substantial number of persons in methadone maintenance treatment are fully employable and present no greater risk of misconduct or substance abuse than the population at large and that these employable methadone

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59/ It bears repeating that the Transit Authority's methadone policy stands in strong contrast to the policies of the New York City Civil Service Commission and the New York State Civil Service Department, which provide that neither history of drug abuse nor current methadone maintenance disqualify an individual for employment in all but a few safety sensitive positions. Pet. 51a-52a; see note 57, supra. The aberrational nature of the Transit Authority policy is also revealed by comparison to its own policy of individualized consideration of persons with more familiar medical conditions, such as diabetes, epilepsy, heart disease, or alcoholism. Indeed, the Transit Authority not only retains rehabilitated alcoholics in its employ, it does not automatically discharge persons with current alcoholism conditions. See Pet. 47a, 63a-64a; notes 20-22, supra and accompanying text.

patients are readily identifiable through the Transit Authority's ordinary personnel screening procedures. Four reasons require affirming its conclusion that excluding all those individuals from ordinary jobs bears no rational relationship to any legitimate governmental interest: (1) the mere fact of past or present methadone maintenance has no behavioral or performance consequences of concern to an employer; (2) recognizing employable methadone patients involves negligible administrative costs; (3) the employability of methadone patients rests on long-tested, proven propositions, not on shifting scientific opinion; and (4) employing methadone patients under the decisions below will in no way impinge upon the safety of the transportation systems operated by the Transit Authority.

a. An individual's past or present methadone maintenance, standing alone, implies no risk of poor performance or misconduct.

As the district court found, individuals in methadone maintenance treatment perform normally in terms of both mental and physical functions and suffer no undesirable side effects. Pet. 33a, 38a. After an initial adjustment period, the strong majority are free from illicit drug abuse and problem drinking. Pet. 42a. Indeed, the findings suggest that the incidence of substance abuse or antisocial behavior among stabilized

methadone patients is no greater than among any comparable segment of the population. Pet. 21a.[60/]

Given these premises, an employer has absolutely no basis for assuming that the likelihood of reliable, safe performance diminishes due to an individual's present or past participation in methadone maintenance treatment. The case at bar thus distinguishes itself from Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). The underlying and indisputable presumption validating the mandatory retirement policy in Murgia was that the risk of physical failure increases with age and that the number of people in a given group incapable of performing under stress increases with age. 427 U.S. at 311.

Methadone maintenance presents a different picture. For the individual officers in Murgia who passed the annual physical, one could still assume that performance would eventually decline with age and that even the physical examination would at some point lose

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60/ The record substantiates the conclusion that the pool of persons who have concluded six months or a year in methadone treatment are as or more employable by any measure than a comparable segment of the population. See, e.g., Tr. 1/7/75, p. 103 (methadone patients after six months treatment more employable than comparison group of disadvantaged minority individuals from same cultural group and neighborhood who had no addiction history) (testimony of Dr. Vincent Dole).

predictive validity. Thus both the annual physicals and the mandatory retirement age were reasonable prophylactic devices, in the context of stress-filled law enforcement duties, to accommodate the undeniable correlation between age and diminished physical capacity.

The successful methadone patient, however, presents no greater risk of poor performance or misconduct than the population at large. A policy excluding him cannot rest on any assumption associating his past addiction or treatment status with a risk relevant to employment; any such assumption, the record here unequivocally demonstrates, would be pure fancy.[61/] As applied to

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61/ Congress too has explicitly recognized the baselessness of excluding methadone patients and other former heroin addicts from ordinary employment:

> From the Federal experience with drug abuse treatment, it is abundantly clear that substantial numbers of former heroin addicts are fully capable of safe, efficient job performance and are readily identifiable. A blanket refusal to hire these individuals cannot be justified.

124 Cong. Rec. S19002 (Daily Ed. Oct. 14, 1978) (remarks of Sen. Williams). This recognition resulted in legislation that

> makes clear that an employer cannot assume that a history of alcoholism or drug addiciton, including a past addiction currently treated by methadone maintenance, poses sufficient danger in and

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individuals who have completed a year or more of methadone treatment -- and the judgments below protect only them — the Transit Authority's policy clearly does have

> the effect of excluding from service so few [individuals] who are in fact unqualified as to render [the fact of methadone maintenance treatment] a criterion wholly unrelated to the objective of the [policy].

Murgia, 427 U.S. at 316.62/

b. Identifying employable methadone patients is of negligible administrative cost to the Transit Authority.

It is conceded that a majority of methadone patients must go through an initial adjustment period

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of itself to justify exclusion. Such an assumption would have no basis in fact. . . .

Id. (emphasis added.) See also part I., supra, where this legislation is described in detail to explain that it warrants dismissal of the writ of certiorari.

62/ In upholding Massachusetts' mandatory retirement policy, this Court expressly noted that the legislature had operated on the principle that retirement should be required at an age at which the efficiency of the "large majority" of employees called for retirement in the public interest. Murgia, 427 U.S. at 316, n. 9.

As the text above makes clear, no comparable principle could possibly be invoked in support of the Transit Authority's methadone policy.

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before they are employable and that a minority may continue to evidence disqualifying behavior after as much as a year in treatment. The district court's findings and substantiating evidence suggest that the size of that minority is not significantly different from the percentage of the general population that might be disqualified for poor performance or misconduct.63/ Regardless, the courts below found that the Transit Authority can identify the employable majority through its ordinary selection procedures, or, in other words, with negligible administrative expense. Pet. 21a, 45a; see "Ability of the Transit Authority to Select Particular Methadone Maintenance Patients for Employment," supra, at pp. 48-57.

Given the identifiability of employable methadone patients, the Transit Authority's only conceivable interest in excluding them is saving the administrative costs of identification. Whatever the constitutional relevance of such costs when they do exist, a public employment criterion is surely irrational if a less exclusionary policy would serve the employer's needs equally well with no significant additional cost. See P. Brest, Processes of Constitutional Decisionmaking 1004 n. 9 (1975).

63/ See Part II.B.2.a. supra.

This proposition demonstrates the irrelevance of the Transit Authority's complaint that the trial judge focused on evidence of performance, freedom from drug abuse, etc., among methadone patients in treatment six months or more (Pet. Br. 17, 20, 40). Verification of the length of treatment is the most trivial of processes. The district judge, again sensitive to the needs of the Transit Authority, accorded it the discretion to set medical standards requiring a year of treatment as a condition of eligibility for employment. The discretion to set that practically self-executing standard renders any Transit Authority interest in excluding methadone patients in the first months of treatment irrelevant to exclusion of patients who remain beyond that period.

As for the minority of patients who remain in methadone treatment yet continue to present a problem of possible concern to an employer, the findings are again clear that the Transit Authority's ordinary screening procedures suffice to select out these individuals. As explained in detail supra at pp. 49-53, the court recognized that "there are large numbers of methadone maintenance patients who are able to provide to a prospective employer satisfactory objective evidence of employability." Pet. 47a-48a. At most, a reference check with the methadone program is indicated, but as the district court explained, "this is essentially no different from obtaining relevant references for other

types of applicants." Pet. 50a, n. 3.[64/] Again, excluding employable methadone patients cannot be justified in terms of the costs of identifying them, for those costs are negligible.[65/]

c. The constitutional rulings below do not rest on unsettled scientific questions.

All the conclusions below regarding the employability of methadone patients rest on unusually settled data. The district judge was adamant that his constitutional ruling not rest in any way on medical opinion that might shift with time:

64/ Congress itself has joined in the recognition that substantial numbers of former heroin addicts are "readily identifiable" as fully capable of safe, efficient job performance. 124 Cong. Rec. S19002 (Daily Ed. Oct. 14, 1978) (remarks of Sen. Williams). See also note 61, supra.

65/ In this regard the Court should distinguish Murgia. Plaintiffs there attempted to rely on the existence of individual physical examinations which the state performed only as a prophylactic measure to detect deteriorating performance prior to the retirement age. The personnel screening undertaken by the Transit Authority is employed to assess the risks of poor performance or misconduct of all sorts in all applicants and employees; it is not a special measure undertaken for early detection of some risk of addiction by which respondents are attempting to bootstrap an argument that an otherwise justified exclusionary policy is unnecessary.

> I don't want to write a Constitutional decision about methadone and have it end up as a thing that is a kind of variable, that someone has a Constitutional right today and five years from now the medical opinion is all different and they don't have the Constitutional right. That is not dealing in a sensible realm of Constitutionality. I want very much to have the whole story on the good and bad points of methadone. . . .

Tr. 11/27/74, p. 30. The judge was able to satifsy this concern. The court's conclusions that methadone maintenance is an efficacious form of treatment that permits normal mental and physical functioning and that many methadone patients are fully and identifiably employable are based on evidence of over a decade of scientific study and practical observation.

Tomorrow may find the discovery of a drug or therapy that cures all addiction and leads to the dismantling of the methadone treatment effort. Such an occurrence would have no effect on the functional, behavioral characteristics of stabilized methadone patients on which the decisions below rest.[66/]

66/ The text above makes clear that the case at bar, unlike Marshall v. United States, 414 U.S. 417, 427 (1974), involves no "medical and scientific uncertainties". In addition, it should be noted that Congress has expressly considered the federal drug abuse treatment experience and concluded that large numbers of methadone patients and other former addicts are fully, identifiably employable and that there is no factual basis for assuming that

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d. The decisions below in no way affect the safety of the Transit Authority's operations.

Plaintiffs wish to stress that the judgment on review in no way impinges on the safety of the transportation system operated by the petitioners. In this regard the case at bar is again distinct from Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 309-10 (1976), which involved solely the stress-filled position of state police officer, a position that this Court has recognized is especially sensitive. See Foley v. Connelie,

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methadone maintenance poses any danger that would warrant a blanket employment ban like that of the Transit Authority. See 124 Cong. Rec. S19002 (Daily Ed. Oct. 14, 1978) (remarks of Sen. Williams); see also note 61, supra. The legislative history alluded to by the Court in Marshall, see 414 U.S. at 426, which pre-dated the widespread implementation and evaluation of methadone maintenance treatment, has simply not stood the tests of time and proven experience.

Moreover, the decision in Marshall turned on an explicit congressional determination, based on significant evidence, that a three-time felon was a less likely candidate for narcotics rehabilitation than an addict without such a record. See 414 U.S. at 428. Respondents have no quarrel with such a premise and note that the decisions below expressly permit the Transit Authority to consider an applicant's criminal record in determining employability. As Congress itself has now recognized, however, there is simply no analogous premise to impugn the employability of the identifiable majority of methadone patients who are successful in treatment.

98 S.Ct. 1067, 1071-73 (1978).[67] Here, by contrast, the Transit Authority has made no challenge to the fact that many of its job titles, including a host of clerical and maintenance positions, are perfectly ordinary positions that do not affect the safety of its system. See pp. 25-28, supra. The Transit Authority's policy, which applies to all but certain "safety-sensitive" titles, of retaining employees with current alcohol problems, who present a far greater risk than the methadone patient demonstrably free of substance abuse, confirms that fact.

Moreover, the district court left the Transit Authority discretion to define safety-sensitive positions from which methadone patients could be excluded. Pet. 67a. In light of the limited dimensions of the judgment, the many Transit Authority jobs unrelated to the system's safety, and the compelling findings that many

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67/ The Transit Authority's implication (Pet. Br. 4) that this case involves employee selection standards for the Transit Authority police is false. Although the opinions and judgments below do not speak directly to the issue the plaintiffs have never challenged those standards.

Additionally, plaintiffs wish to note that the issue before the Court in Bradley v. Vance, 436 F.Supp. 134 (D.D.C. 1974) (3 judge court), prob. juris. noted, 98 S.Ct. 2230 (1978), has no bearing on the case at bar. The Foreign Service mandatory retirement provision challenged in Bradley, like the police officer measure in

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stabilized individuals in methadone maintenance treatment present no greater risk of poor judgment, slow reactions, or misconduct than the population at large, there can be no argument that the decisions on review affect the safe or efficient operation of the transit system.[68]

Murgia, applies only to sensitive jobs involving unusual physical and psychological demands. As in Murgia, the retirement rule rests on the inevitable consequences of aging which affect physical ability and performance under stress. Again, no such adverse assumption can be made regarding the effects of methadone maintenance. See part II.B.2.a. supra. Finally, the special demands of Foreign Service careers have been the subject of repeated congressional examination resulting in consistent legislative determinations that earlier mandatory retirement for Foreign Service officers than other federal civil servants is justified. See, e.g., 65 Cong. Rec. 7564-65 (1924); S. Rep. No. 168, 77th Cong., 1st Sess. 2 (1941); S. Doc. No. 14, 90th Cong., 1st Sess. 112 (1967) (Cabinet Committee study of federal staff retirement systems submitted to Congress as appendix to annual Bureau of the Budget and Civil Service Commission report on federal salaries).

68/ It bears repeating that Congress has confirmed that there is no basis in fact for assuming that methadone maintenance or a history of drug addiction poses any danger to the safety of persons or property that would warrant exclusionary employment policies such as that of the Transit Authority. See 124 Cong. Rec. S19001-02 (Daily Ed. Oct. 14, 1978) (remarks of Sen. Williams); see also note 61, supra.

C. Conclusion

The case at bar presents a striking picture of a federal district judge, sensitive to the appropriate limits of his office, who, when confronted with a governmental body's abdication of its responsibility for rational policy-making, engaged in an exhaustive search for a rational connection between policy and legitimate governmental end, and found on compelling evidence that there was none. Plaintiffs urge that if the invalidating of the Transit Authority's methadone policy cannot be sustained, the Equal Protection Clause is indeed an empty guarantee outside of those classes denominated suspect or "quasi-suspect" and those interests deemed fundamental. Neither modern case law nor sound notions of judicial restraint warrants such an emasculation of that clause. The constitutional ruling below should be affirmed.

III

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE TRANSIT AUTHORITY'S POLICY VIOLATED TITLE VII IN THAT IT HAD A RACIALLY DISCRIMINATORY IMPACT AND WAS UNRELATED TO BUSINESS NECESSITY.

It is respectfully submitted that no question relating to the legality of the Transit Authority's policy under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.) (hereinafter, "Title VII") is properly before this Court.

The only relief which depended upon the district court's holding that the Transit Authority's methadone policy violated Title VII, in that it had a disparate adverse impact upon blacks and Hispanics and was not job-related, was an award of attorney's fees. Pet. 71a. The need for this jurisdictional base was obviated by the subsequent enactment of the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. §1988), which provided an independent ground for the award of fees. Tr. 1/13/77, p. 177, CA 508a; Pet. 75a-80a. The court of appeals, affirming the award of fees under the 1976 act, saw no need to reach the Title VII issues in the case.

Pet. 3a-4a.[69/] However, the district court's holding that the Transit Authority's policy violated Title VII was clearly correct.

There can be no doubt that the Transit Authority's drug policy constitutes a form of racial discrimination that goes beyond a mere technical showing of racial impact. The Transit Authority's methadone policy is in fact part of a broader policy banning the employment of all persons with any history of drug abuse. And the unfortunate fact is that drugs have long been intrinsically linked to minority ghetto life. Eighty percent of all active heroin addicts are black or Hispanic. Tr. 10/24/74, p. 460, CA 840a. Two of the named plaintiffs are black and two are Hispanic. Beazer, who grew up in Harlem, started using heroin at age 13:

> Drugs was all around me, and in the neighborhood I live at that time was the constant thing.... [T]he landlord was using drugs and selling it. The super was using drugs and selling

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69/ Having upheld the district court's holding of a constitutional violation, the court of appeals quite appropriately pretermitted decision on whether the Transit Authority's policy violated Title VII, since Title VII could have afforded relief only to those members of the certified class who were black or Hispanic.

> it. My next door neighbor was using drugs. Everyone was using drugs.

Tr. 10/24/74, p. 205, CA 591a. Reyes grew up in a public housing project in Queens, and also started using heroin, almost as a matter of course, when he was 13 years old:

> I grew up—when I grew up it was something that you grow up into . . . [Y]our friends are using drugs, their brothers are using drugs. Your mothers and fathers are. You don't really believe it is that bad, not at that age.

Tr. 10/24/74, pp. 269-70, CA 668-669a. Dr. Dole testified that the prototypical addict is someone who is

> black or Puerto Rican, who is brought up in a disadvantaged neighborhood, say East Harlem or the Bronx or Brooklyn or some neighborhood where an enormous exposure to narcotic drugs occurred when he was in adolescence. They were all over the streets and the action was to fool around with drugs. . . . The big man in the neighborhood was the fellow with alligator shoes selling the stuff . . . In some ways, if you are a kid in that cultural group in that neighborhood and you haven't ever tried narcotics, you are out of it. You are a deviant.

Tr. 1/7/75, p. 82, CA 1563a.

The contrast between the Transit Authority's enlightened policy towards alcoholism—a problem with which middle class whites are more familiar and less uncomfortable—and its attitude toward drug addiction—a problem primarily associated with minority ghetto dwellers—demonstrates the inherently racial nature of its

drug policy.[70] Indeed, the trial court might well have found that the Transit Authority's knowledge that blacks and Hispanics were in fact bearing the brunt of its drug policy (Lanzetta Dep. p. 80, CA 2445a), was sufficient to support an inference of intentional discrimination.[71]

These are among the considerations that have led

70/ Of those admitted in 1977 to federally funded drug treatment programs in New York State for heroin abuse, 85.5% were black or Hispanic, and 14.3% were white. National Institute on Drug Abuse, Alcohol, Drug Abuse, and Mental Health Administration, Public Health Service, Department of Health, Education and Welfare, State Statistics, 1977, Statistical Series E, Number 8, Table 3, p. 203 (1978). By contrast, of those admitted to state or federally assisted alcoholism treatment programs in New York State in the year ending March 31, 1977, 24% were black or Hispanic and 57% were white. National Institute on Alcohol Abuse and Alcoholism, Alcohol, Drug Abuse and Mental Health Administration, Public Health Service, Department of Health, Education and Welfare, State Alcoholism Profile Information System, National Status Report Update, Vol. II, Table 26, pp. 86-88 (May 1978).

71/ See Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring); United States v. Texas Education Agency, 579 F.2d 910, 913 (5th Cir. 1978); United States v. School District of Omaha, 565 F.2d 127 (8th Cir. 1977) (en banc) cert. denied, 434 U.S. 1065 (1978); NAACP v. Lansing Board of Education, 559 F.2d 1042, 1047-48 (6th Cir. 1977), cert. denied, 434 U.S. 997 (1977).

commentators to conclude that Title VII prohibits discrimination against methadone participants:

> [D]iscrimination against ex-addicts is more than merely statistically related to racial discrimination. While courts tend to deal purely in terms of numerical percentages, there is a link between addiction and other problems more readily associated with past racial discrimination. The concentration of heroin users in the poverty-stricken slum areas of major cities provides one indication of this connection. A high rate of addiction may thus be seen as a product of past racial discrimination. . . .

Note, Employment Discrimination Against Rehabilitated Addicts, 49 N.Y.U.L.Rev. 67, 72 (1974).

A. The Facts as Found by the District Court, Unchallenged Below, Are Sufficient to Support a Finding of Disparate Impact of the Transit Authority's Policies on Minorities. 72/

The district court based its conclusion that the Transit Authority's methadone policy has a racially discriminatory effect on blacks and Hispanics on two facts: 1) of the Transit Authority employees referred to the Transit Authority's medical consultant for violations

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72/ In responding to section II of petitioner's argument respondents are reversing the sequence of issues briefed in order to present the statutory question before the constitutional one.

of its drug policy, 80% were black or Hispanic and 19% were white (Pet. 72a); and 2) between 62% and 65% of methadone maintained persons in New York City are black or Hispanic (Pet. 73a). By comparison, the population from which the Transit Authority draws its employees is only 20.1% black and Hispanic. A. 1041A.

The Transit Authority's challenge to the district court's finding that its methadone policy had a disparate adverse impact upon blacks and Hispanics consists primarily of an attack, articulated for the first time in this Court, upon the completeness, accuracy, statistical significance and relevance of the data upon which the district court relied. Pet. Br. 33-34, 49-52. Nowhere in either the district court or the court of appeals did petitioners raise any of the objections to the trial court's findings that they raise here. This Court's remarks in Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) apply with equal force to this case:

> The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by plaintiff, he is free to adduce countervailing evidence of his own.

Petitioners offered no evidence at trial even suggesting that minority representation among methadone maintainees was not substantially greater than minority

representation in the general population, in the Transit Authority's work force, or in the Transit Authority's applicant pool.[73/]

The record contains ample evidence, in addition to that cited by the district court, to support its finding of disparate impact.

73/ The reason that there are no data in the record regarding the precise racial breakdown of persons actually dismissed from or rejected for Transit Authority employment due to the methadone policy is that the Transit Authority refused to make discovery on this issue and the court denied plaintiffs' motion to compel such discovery. See Plaintiffs' Interrogatories and Request for Production addressed to Transit Authority defendants (June 22, 1973) Nos. 52-53; Transit Authority Defendants' Answers (October 23, 1973) Nos. 52-53; Plaintiffs' Affidavit in Support of Motion for Sanctions for Failure to Make Discovery, Oct. 18, 1973.

It is clear, however, that the overall population statistics cited above amply support the court's findings of adverse racial impact under Title VII. As demonstrated infra, it is precisely such statistics that have been relied upon to establish unlawful racial discrimination in cases directly comparable to the instant action.

Moreover, where, as here, a publicly admitted and announced blanket policy is at issue, statistics relating to the general workforce population and to the population subject to the policy are clearly more relevant than any other statistics, since most methadone patients would simply not have applied for a job from which they knew they would be excluded, no matter how eligible and how anxious for such employment. See Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

There was expert testimony that blacks and Hispanics constitute 80% of all heroin addicts (Tr. 10/24/74, p. 460, CA 840a), and that participants in New York's methadone programs are predominantly black or Hispanic (Tr. 1/7/75, p. 82, CA 1563a; Tr. 1/27/75, p. 489, CA 1767a).[74/] Dr. Louis Lanzetta, the Transit Authority's medical director, testified that he interviews all applicants and employees suspected of drug use (Lanzetta Dep., pp. 24, 29, 79, CA 2402a, 2407a, 2444a) and that between seventy-five and eighty percent are black or Hispanic (Lanzetta Dep., p. 80, CA 2445a).

Petitioners complain that the district court did not dispose of the Title VII question in their favor on the basis of the Transit Authority's work force statistics. Pet. Br. 33, 53. The implication that an employment criterion which operates to exclude minorities at a substantially higher rate than whites can be immunized from scrutiny under Title VII by the presence in the work force of a large number of minorities flies in the face of Griggs v. Duke Power Co., 401 U.S. 424 (1971). Griggs

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74/ In New York State, blacks and Hispanics comprised 85.5% of those admitted to treatment for heroin abuse in federally funded drug treatment programs in 1977. See note 70, supra.

teaches that to escape liability under Title VII an employer must establish the job relatedness of "any given requirement" that has a discriminatory effect. 401 U.S. at 432. This Court recently reaffirmed the holding of Griggs in Furnco Construction Corp. v. Waters, ____ U.S. ____, 98 Sup. Ct. 2943, 2951 (1978):

> It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. (Emphasis in original).

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), this Court spoke to establishing a "prima facie case of discrimination" on the basis of a test's impact on "applicants for hire or promotion." Accord, Dothard v. Rawlinson, 433 U.S. at 329. See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n. 14 (1973). Several lower courts have found adverse effect on the basis of a selection criterion's racial impact, even though the employer's work force or new hires included a higher proportion of minority group members than did the local population.[75/] To hold otherwise would be to permit

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75/ Green v. Missouri Pacific Railroad Co., 523 F.2d 1290, 1300 (8th Cir. 1975); Davis v. Washington, 512 F.2d

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employers to use a wide range of discriminatory non-job-related selection devices, as long as minority representation in their work force equaled minority representation in the labor market. This in effect would create an upper limit quota for minority employment, excluding many from entry level jobs of the type involved in this case, where, because of societal discrimination and disadvantage, one would expect minorities to be over-represented.

In a number of cases courts have relied on a statistical showing of racial impact directly comparable to that made out here to hold that employment policies excluding persons on the basis of criteria such as arrests, convictions, and garnishment were violative of Title VII. See e.g., Green v. Missouri Pacific Railroad Co., 523 F.2d 1290, 1294-95 (8th Cir. 1975)(since blacks were 2 to 6 times more likely than whites to have conviction records, employer's policy of refusing to hire any person with a criminal conviction violative of Title VII); Gregory v. Litton Systems, Inc., 316 F.Supp. 401, 403 (C.D. Cal. 1970), aff'd 472 F.2d 631 (9th Cir. 1972)(employer's use of arrest records violative of Title VII since blacks nationally comprise 11% of the population, and account for 27% of reported arrests);[76/] Wallace v. Debron Corp., 404 F.2d 674 (8th Cir. 1974) and Johnson v. Pike Corp., 332 F.Supp. 490, 494 (C.D. Cal. 1971)(discharge of employees whose wages have been frequently garnisheed violative of Title VII since proportion of racial minorities among the group of people who have had their wages garnished is significantly higher than the proportion of minorities in the general population).

956, 960-61 (D.C. Cir. 1975), reversed on other grounds, 426 U.S. 229 (1976); Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364, 1372-73 (5th Cir. 1974); Jones v. New York City Human Resources Administration, 391 F.Supp. 1064, 1068-69 (S.D.N.Y. 1975), aff'd, 528 F.2d 696 (2d Cir. 1976).

76/ See also Carter v. Gallagher, 3 Empl. Prac. Dec. (CCH) ¶8205 (D. Minn. 1971), aff'd in relevant part, 452 F.2d 315 (8th Cir. 1971), aff'd in relevant part, 452 F.2d 315, 327 (8th Cir. 1972) (en banc), cert. denied, 406 U.S. 950 (1972) ("Comparison of the census data with the arrest data reveals that there is and has been a substantial and significant disparity between the percentage of non-white persons in the city and the percentage of non-white persons arrested . . . Since the percentage of arrests was substantially higher for non-white persons in Minneapolis, the purported arrest record qualification would have had a decided discriminatory effect in discouraging non-white persons from applying for the fire fighter position . . ." 3 Empl. Prac. Dec. (CCH) at 6670).

B. The Transit Authority Made No Showing That Its Methadone Policy was Job-related.

Once it was established that the Transit Authority's methadone policy operates in a disparately adverse manner upon blacks and Hispanics, the burden shifted to the Authority to demonstrate that its policy bears "a manifest relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S. at 432. "Congress has commanded" that any selection criteria used "must measure the person for the job and not the person in the abstract." Id. at 436. Accord, Albemarle Paper Co. v. Moody, 422 U.S. at 425.

The Transit Authority never even attempted to meet this burden. It stipulated that it never studied the requirements of any of its jobs to determine the present ability of methadone maintained persons to perform them. A.79A. Nor did it make any attempt to evaluate the job performance of employees participating in methadone maintenance programs, which employees were later terminated when such participation was discovered. A.80A.

As demonstrated, the Transit Authority's methadone policy fails to satisfy the most lenient equal protection standard—the rational relationship test. Obviously the policy dramatically fails the far stricter business necessity test. The Authority not only failed to

validate its policy—it failed even to think about it.

The district court was clearly correct in finding that the policy has "no rational relation to the demands of the jobs to be performed," that it "goes beyond any rational or legitimate needs of the Transit Authority, and excludes persons just as qualified for employment as many who are hired by the Transit Authority." Pet. 64a, 67a.

C. Extension of Title VII Coverage to Public Employers is a Valid Exercise of Congressional Power Under Both the Commerce Clause and Section 5 of the Fourteenth Amendment.

In the Equal Employment Opportunity Act of 1972, 86 Stat. 103, Congress extended Title VII to agencies of state government, relying upon the authority granted to it by the Commerce Clause, Article I, §8, cl. 3, and Section 5 of the Fourteenth Amendment. See H.R. Rep. No. 92-238, 92d Cong., lst Sess. 19 (1971); S.Rep. No. 92-415, 92d Cong., lst Sess. 11 (1971); 118 Cong. Rec. 1816, 1839-40 (1972) (Remarks of Senators Williams and Javits). Petitioners contend that in the light of this Court's decisions in National League of Cities v. Usery, 426 U.S. 833 (1976) and Washington v. Davis, 426 U.S. 229 (1976), neither source of legislative authority can sustain Title VII of the Civil Rights Act of 1964 insofar as that law bars state and local public employers from engaging in

practices which, while adversely affecting minority groups, are not shown to be purposefully discriminatory. Petitioners have overdrawn the scope of National League of Cities and the impact of Washington v. Davis. Both the Commerce Clause and the Fourteenth Amendment support Title VII as amended in 1972.

1. The Commerce Clause authorizes application of Title VII to agencies of state government.

National League of Cities established that Congress does not have the same unfettered control over state and local government activities affecting interstate commerce that it has over private businesses, and that a statute proper as to private industry may be invalidated if it interferes excessively with the "integral governmental functions" of states or cities. 426 U.S. at 851. The constitutionality of such legislation depends upon "the degree of intrusion upon the protected area of state sovereignty" and the extent to which its object is, as a legal or practical matter, an area of substantial federal interest. 426 U.S. at 852-853.[77/] The federal

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77/ National League of Cities does not indiscriminately bar all federal legislation enacted pursuant to the

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interest in protecting racial minorities is well established in our constitutional system, and transcends the type of concern at issue in National League of Cities. Conformity with Title VII's effect rule, unlike the minimum wage in National League of Cities, will not increase the payroll costs of complying jurisdictions. Since Title VII prohibits only selection practices which are non-job-related, compliance will not interfere with any legitimate state or local policies.[78/]

Commerce Clause that would regulate state agencies in their role as employers. The Court specifically declined to overrule Fry v. United States, 421 U.S. 542 (1975) (sustaining Congressional power to apply a wage freeze to employees of state government); Parden v. Terminal Railway Co., 377 U.S. 184 (1964) (sustaining Congressional power to apply the Federal Employers Liability Act to state-owned railroads); California v. Taylor, 353 U.S. 553 (1957) (sustaining Congressional power to apply the Railway Labor Act to state-owned railroads); or United States v. California, 297 U.S. 175 (1936) (sustaining Congressional power to apply the Safety Appliance Act to state-owned railroads).

78/ The selection practice held violative of Title VII in this case is also contrary to the law and policies of New York State and New York City. See note 57, supra.

2. The extension to state and local governments of Title VII's prohibition of practices which have a disproportionately adverse impact but which are not the result of a discriminatory purpose is a valid exercise of congressional power under the enforcement clause of the Fourteenth Amendment.

The scope of the powers granted by the Enforcement Clauses of the Civil War Amendments is well illustrated by reference to the cases involving literacy tests for voter registration. In Lassiter v. Northampton County Board of Elections, 360 U.S. 545 (1959), this Court held unanimously that, absent proof of discriminatory purpose or discriminatory administration, North Carolina's literacy test did not violate the Fourteenth or Fifteenth Amendments.

Then the Voting Rights Act of 1965 was passed and Congress suspended all literacy tests in the areas covered by the Act, based upon evidence of discriminatory purpose or discriminatory administration in some areas. Section 4(a) of the Act, 79 Stat. 438. When this provision was challenged, this Court held that an across-the-board suspension, even without prior adjudication of a particular test's invalidity because of discriminatory purpose or discriminatory administration, was appropriate legislation to "enforce" the Fifteenth Amendment. South Carolina v. Katzenbach, 383 U.S. 301, 333-34, 337 (1966).

The ban on literacy tests was extended nationwide by section 201 of the Voting Rights Act Amendments of 1970, 84 Stat. 315, 42 U.S.C. §1973aa. Under this amendment, no state or political subdivision of a state could escape the ban by showing that it had never discriminated in voting, and that it had never used any "test or device" in a discriminatory manner or with a discriminatory purpose. Despite the legality of such literacy tests under the Fourteenth and Fifteenth Amendments in areas, such as Arizona, which had never discriminated or tried to discriminate, this Court unanimously upheld the new right declared by Congress under the Enforcement Clause of these Amendments. Oregon v. Mitchell, 400 U.S. 112, 118 (1970).

The impact of the Enforcement Clause power upon the scope of the Fourteenth and Fifteenth Amendments rights is clear. In an area which the Court had refused to enter because of the limitations on its power to define violations of the Civil War Amendments, the Enforcement Clause gave Congress the power both to define new rights and to provide new means of effectuating old rights, in order to protect the underlying constitutionally declared right to freedom from discriminatory obstacles to voting. Similarly, it is clear that not every new voting procedure in a state which had formerly discriminated in voting would contravene the Fourteenth and Fifteenth

Amendments, but this Court has held that Congress had the power under the Enforcement Clauses to suspend such new procedures and to make them unlawful unless the State carries the burden of showing that the changes will have neither the purpose nor the effect of discrimination in voting. South Carolina v. Katzenbach, 383 U.S. at 334-35.

From the beginning, the Enforcement Clauses of the Civil War Amendments have been held to invest Congress, the branch of government expressly entrusted with their enforcement, with the authority both to create new rights serving the general purposes of the Amendments, and to create new remedies to effectuate those rights. To enforce the prohibition of "involuntary servitude" in the Thirteenth Amendment, Congress had the power to enact the anti-peonage statute, 14 Stat. 546, 18 U.S.C. §1581, which extended the definition of Thirteenth Amendment rights to include compulsory service to secure the payment of a debt, and extended the remedy for their violation by providing criminal sanctions. Clyatt v. United States, 197 U.S. 207, 218 (1905). To enforce the prohibitions of the Fourteenth Amendment, Congress had the power to enact section 4 of the Civil Rights Act of 1875, 18 Stat. 336, 18 U.S.C. §243, which extended the definition of Fourteenth Amendment rights to include the right to freedom from

racial discrimination in service on grand juries and trial juries, and provided the remedy of criminal sanctions, and the remedy of removal, for such violations. Ex parte Virginia, 100 U.S. 339 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880). This Court had not itself defined the scope of Thirteenth and Fourteenth Amendment rights to include such matters at the time Congress enacted these provisions, and it could certainly never have provided the remedies discussed above.

Congress, therefore, clearly has the power under the Enforcement Clause to define rights under the Fourteenth Amendment which go beyond those independently guaranteed by the Amendment; it clearly has the power to alter and shift the burden of proof required to establish a violation of the rights secured by the Amendment; and, it has the power to create new remedies, of a kind different from that which the courts themselves could create for their violation.

The only remaining question is whether the particular Congressional action in question is appropriate under the Fourteenth Amendment. In essence, does the legislation conflict with an express prohibition in the Constitution, is the legislation "adapted to carry out the objects the amendments have in view", and does it tend "to enforce submission to the prohibitions they contain"? Ex parte Virginia, 100 U.S. at 345-46. Accord, McCulloch

v. Maryland, 17 U.S. (4 Wheat.) 315, 421 (1819); South Carolina v. Katzenbach, 383 U.S. at 326; Katzenbach v. Morgan, 384 U.S. 641, 650 (1977); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968). Cf. James Everard's Breweries v. Day, 265 U.S. 545, 559 (1924).

The holding of Washington v. Davis that purposeful discrimination is a required element of a Fourteenth Amendment violation did not purport to create a constitutional right in a state to freedom from all judicial inquiry as to its employment practices in the absence of such a showing. It merely stated a limit to judicial enforcement of the Amendment in the absence of action by the branch of government the Amendment had designated as primarily responsible for its enforcement. Compare Lassiter with South Carolina v. Katzenbach.

On its face, the extension of Title VII to state and local governments is adapted to carry out the objects of the Fourteenth Amendment and to enforce submission to its prohibition against discrimination. In evaluating the propriety of the "inventive manner" in which Congress exercised its authority to end purposeful discrimination in voting by broadly prohibiting practices shown to have had a disparate racial impact in some particular situations, this Court held that such legislative action was permissible where Congress had a sufficient factual basis

for deciding that there was a problem of sufficient scope to warrant its intervention. South Carolina v. Katzenbach, 383 U.S. at 327, 329-31. Accord, Katzenbach v. Morgan, 384 U.S. at 654-56; Oregon v. Mitchell, 400 U.S. at 132-33 (Black, J.). Cf. Regents of the University of California v. Bakke, ____ U.S. ____, 98 Sup. Ct. 2733, 2755 n. 41 (1978) (Opinion of Powell, J.); Id. at 2812-13 (Opinion of Stevens, Stewart and Rehnquist, JJ. and Burger, C.J.). In South Carolina v. Katzenbach, this Court held that "Congress . . . may avail itself of information from any probative source", and held that studies of the U.S. Commission on Civil Rights were such a probative source. 383 U.S. at 330.

The legislative history of the Equal Employment Opportunity Act of 1972 clearly shows a sufficient factual basis for the extension of Title VII to local and State governments. The U.S. Commission on Civil Rights had issued a report in 1969, For All the People...By All the People: A Report on Equal Opportunity in State and Local Government Employment, which found extensive employment discrimination by state and local governments, both of the purposeful type and of the type involving objective, facially neutral requirements adopted in good faith but having a disproportionately adverse

effect on blacks,[79] and concluded by recommending the elimination of the exemption of state and local govern-

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79/ The Commission's findings stated in part:

> BARRIERS TO EQUAL OPPORTUNITY
>
> 4. State and local government employment opportunities for minorities are restricted by overt discrimination in personnel actions and hiring decisions, a lack of positive action by governments to redress the consequences of past discrimination, and discriminatory and biased treatment on the job.
>
> (a) A merit system of public personnel administration does not eliminate discrimination against members of minorities. It proclaims objectivity, but does not assure it. Discrimination occurs both in recruiting and in selection among final applicants.
>
> (b) Governments have undertaken few efforts to eliminate recruitment and selection devices which are arbitrary, unrelated to job performance, and result in unequal treatment of minorities. Further, governments have failed to undertake programs of positive action to recruit minority applicants and to help them overcome barriers created by current selection procedures.
>
> (c) Promotional opportunities are not made available to minorities on an equal basis by governments that rely on criteria unrelated to job performance and on discriminatory supervisory ratings.

For All the People at 119. Its Conclusion made the same point at 131-32.

ments from the coverage of Title VII. Id. at 128. The Senate Committee Report expressly relied on this report, and cited its references to forms of discrimination not involving discriminatory purpose:

> The report's findings indicate that the existence of discrimination is perpetuated by both institutional and overt discriminatory practices, and that past discriminatory practices are maintained through de facto segregated job ladders, invalid selection techniques, and stereotypical misconceptions by supervisors regarding minority group capabilities. The study also indicates that employment discrimination in State and local governments is more pervasive than in the private sector.

S.Rep.No. 92-415, supra, at 10. The House Committee Report was substantially similar. H.Rep.No. 92-238, supra, at 17.

Under the standards established by this Court since the passage of the Civil War Amendments, the extension of Title VII to state and local governments was appropriate legislation under the Enforcement Clause of the Fourteenth Amendment.

CONCLUSION

WHEREFORE, plaintiffs respectfully pray that this Court affirm the judgment of the court of appeals or dismiss the writ of certiorari.

Respectfully submitted,

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